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No. _____

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IN THE

Supreme Court of the United States

October Term, 1987

REICHHOLD CHEMICALS, INC.,
Petitioner,
v.
GERARD A. CASSINO and SALLY CASSINO,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Whether a Settlement Agreement and Release, offered by an employer to a laid-off executive at the time of termination and containing *inter alia* an explicit release of age discrimination claims in an effort to comply with federal standards for "knowing" waivers, should have been admitted and argued to the jury as evidence of age discrimination?

2. Whether reinstatement of employment, the preferred remedy in an age discrimination case, can be disregarded in favor of front pay (prospective monetary damages) based solely upon hostility inferred from vigorously contested litigation?

PARTIES TO THE PROCEEDING

The petitioner in this matter is Reichhold Chemicals, Inc., a New York corporation, which was the defendant in the trial court proceeding. Reichhold Chemicals, Inc. is a subsidiary of Dainippon Ink & Chemicals, Inc. The respondents in this proceeding are Gerard A. Cassino and Sally Cassino, a marital community, who were individual plaintiffs in the trial court proceeding.

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v.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The U.S. District Court for the Western District of Washington (Tanner, J.) entered judgment for plaintiff following a jury trial on July 23, 1985. (Appendix C) No formal or reported opinion was issued. Petitioner's motion for judgment notwithstanding the verdict and for a new trial was denied by order of the trial court on August 30, 1985. (Appendix D) Petitioner filed a notice of appeal on September 24, 1985. The Ninth Circuit issued its opinion, affirming in part and reversing in part, on May 15, 1987; this opinion is reported at 817 F.2d 1338. (Appendix A) Petitioner's petition for rehearing and rehearing *en banc* before the Ninth Circuit was denied on August 31, 1987. (Appendix B)

JURISDICTION OF THIS COURT

Jurisdiction of this Court is based upon 28 U.S.C. § 1254(1). The timing of this petition is governed by 28 U.S.C. § 2101(c), providing ninety days from the August 31, 1987 order of the Ninth Circuit denying rehearing. *See also* Supreme Court Rules 20.4 and 29.1.

PERTINENT STATUTES AND REGULATIONS

1. Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*

2. 29 C.F.R. § 1627.16.

FEDERAL JURISDICTION

Original federal jurisdiction in this case rests both on federal question jurisdiction, 28 U.S.C. §§ 1331 and 1343(4), and diversity jurisdiction. 28 U.S.C. § 1332(a)(1).

STATEMENT OF THE CASE

A. Material Facts

Petitioner Reichhold Chemicals, Inc. ("Reichhold") employed respondent Gerard A. Cassino ("Cassino") as its regional labor relations manager until a corporate reorganization resulted in a reduction in force in June 1983. The reorganization eliminated the regional administrative staff in Tacoma, Washington. Cassino was one of sixteen salaried employees laid off at that time.

On June 23, 1983 Reichhold informed Cassino of his impending layoff. Reichhold offered Cassino a substantial severance package, to which he was not otherwise entitled,[1] if he would agree not to pursue any legal action against the company over his termination. Reichhold officials explained this proposed settlement to Cassino and gave him a formal

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[1] Reichhold offered Cassino a severance package which included $18,000, the equivalent of six months' salary. It was undisputed that, apart from this proposed settlement, Reichhold had no policy or contractual obligation to provide any severance payment or benefits.

Settlement Agreement and General Release (the "Settlement")[2] to review. They asked Cassino to take the Settlement home, read it carefully, and review it with an attorney if he chose before deciding whether to accept. No deadline was given. Cassino immediately refused the proposed Settlement, telling Reichhold management at the June 23 meeting, "I'll see you in court."

The Settlement document itself was a form prepared by Reichhold's outside counsel for general use during the reduction in force. Reichhold used this Settlement form with all affected employees regardless of age, modifying only the amount of the settlement. The release language of the Settlement form, in order to comply with judicial standards for clear and knowing waivers, explicitly recites that *inter alia* it waives claims for age discrimination.

B. Trial Court Rulings

Following his refusal to sign the Settlement, Cassino filed this lawsuit claiming age discrimination under both federal and state laws.[3] The suit was filed and tried before the U.S. District Court for the Western District of Washington, Judge Jack E. Tanner presiding.

Prior to trial, Reichhold moved *in limine* to exclude evidence of the Settlement. (Appendix H) This motion was argued at the beginning of trial and denied. (Appendix I) At trial, Cassino's counsel then introduced the Settlement as direct evidence of discrimination. Cassino and his counsel read the explicit release language to the jury, arguing that since

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[2] A copy of the proposed Settlement is reproduced as Appendix G.

[3] The suit was based on both the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, and the Washington Law Against Discrimination, Chap. 49.60 RCW. All administrative prerequisites to filing were met.

Reichhold was asking for an express release of age discrimination claims it must have known it was discriminating. The Release was a major element of Cassino's case.

At trial, Cassino presented no evidence showing hostility or antagonism between himself and Reichhold. The only testimony in that regard showed that he would have taken other jobs at Reichhold, felt he should have been transferred or reassigned, and was still on friendly terms with current Reichhold employees. Nevertheless, the court submitted the issue of front pay, along with the other damage issues, to the jury. The court made no ruling, and gave no instruction to the jury, on the need to find hostility or any other factual predicate to awarding front pay. The jury returned a verdict in favor of Cassino, awarding him $492,000 in damages, including $150,000 in front pay.

A judgment on this verdict was entered July 23, 1985. (Appendix C) The district court's order denying Reichhold's motions for judgment notwithstanding the verdict and for new trial was entered August 30, 1985. (Appendix D) Reichhold filed a notice of appeal on September 24, 1985.

C. Court of Appeals Decision

The Ninth Circuit Court of Appeals upheld both the admission into evidence of the Release and the awarding of front pay by the jury.

Regarding the Release, the Court drew a distinction between a "settlement agreement" and "termination agreement." It held that a "settlement agreement" is where "an employee relinquishes the right to a judicial determination of an ADEA claim in return for valuable consideration after having asserted that he or she is a victim of illegal discrimination." 817 F.2d at 1342. A "termination agreement," on the other hand, "occurs when an employment relationship is terminated and

the employer offers a contemporaneous severance pay package in exchange for a release of all potential claims, including claims for discriminatory acts that may have occurred at or before the termination." *Id.*

The Ninth Circuit held that evidence of the former type of agreement was precluded by Fed. R. Evid. 408, but that the latter was not. Since there was no asserted claim at the time Reichhold offered the Settlement to Cassino, the Ninth Circuit held it was admissible to prove age discrimination.

The Ninth Circuit did not address Reichhold's argument that the Release was also barred by Fed. R. Evid. 403 since any probative value was substantially outweighed by the prejudicial effect of admitting the Settlement into evidence.

The Ninth Circuit also upheld the award of front pay in lieu of reinstatement to Cassino. Although the court noted that reinstatement is the preferred remedy in age discrimination cases, it held that the decision to award front pay in lieu of reinstatement was a decision for the trial court. It found that the trial court did not abuse this discretion since "the record indicates that some hostility developed between Reichhold and Cassino during the litigation." 817 F.2d at 1347. The Ninth Circuit found no evidence of hostility or other barrier to reinstatement other than what developed during the course of litigation. The trial court had made no finding of hostility whatsoever.

Reichhold petitioned for rehearing (suggesting rehearing *en banc*) on June 1, 1987. This petition was denied on August 31, 1987. (Appendix B)

REASONS FOR GRANTING THE WRIT

This Court should grant the writ of certiorari because the decision below departs from the accepted and usual course of judicial proceedings and decides important questions of federal law which have not been, but should be, settled by this Court. The decision below also conflicts with the policies behind the ADEA, existing regulations of the Equal Employment Opportunity Commission ("EEOC"),[4] Fed. R. Evid. 403 and 408, and decisions from other federal courts of appeals.[5]

I. Permitting Evidence Of A Proposed Settlement Agreement To Establish An Age Discrimination Claim Would Revolutionize Modern Industrial Relations Practice and Defeat The Policy Of Encouraging Settlements.

A. Admitting Evidence of a Proposed Settlement Agreement Conflicts with the Policies Behind the ADEA, Regulations of the EEOC, and Decisions in Four Circuits.

The ability of employers and employees voluntarily to exchange a release of claims for enhanced severance benefits or additional compensation is a subject of national importance. In just the past two years, this issue has spawned both substantial litigation in the federal courts and significant rulemaking by the EEOC. Until the Ninth Circuit's decision in this case, the EEOC and all appellate courts which had considered the issue concluded that a knowing and voluntary exchange of additional compensation in return for a release of age discrimination claims was enforceable against

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[4] The Equal Employment Opportunity Commission ("EEOC") is the federal agency currently responsible for enforcing the ADEA.

[5] Because the Ninth Circuit decision contradicts EEOC regulations and, thus, federal enforcement policy, petitioner respectfully suggests that the Court might wish to seek the view of the Solicitor General on granting the writ of certiorari.

both the employer and employee. *EEOC v. Cosmair, Inc.*, 821 F.2d 1085 (5th Cir. 1987); *Lancaster v. Buerkle Buick-Honda Co.*, 809 F.2d 539 (8th Cir.), *cert. denied*, 107 S. Ct. 3212 (1987); *Moore v. McGraw Edison Co.*, 804 F.2d 1026 (8th Cir. 1986); *Runyan v. National Cash Register Corp.*, 787 F.2d 1039 (6th Cir. 1986) *(en banc), cert. denied*, 107 S. Ct. 178 (1987); *Pruet Production Co. v. Ayles*, 784 F.2d 1275 (5th Cir. 1986); 52 Fed. Reg. 32,293 (1987)(to be codified at 29 C.F.R. § 1627.16).[6] Since the Ninth Circuit decision, a fourth court of appeals has upheld such a release in the severance context. *Sullivan v. Boron Oil Co.*, ____F.2d____, Daily Lab. Rep. No. 202 [BNA], October 21, 1987 at D-1 (3d Cir. September 30, 1987).

The Ninth Circuit's decision conflicts with these opinions, conflicts with the policies behind the ADEA and Fed. R. Evid. 408, and impedes a widely-accepted industrial relations practice. It also appears to create the unprecedented and anomalous result that an employer whose termination agreement offer is accepted is immune from age discrimination claims, but if that same offer is rejected by the employee it becomes evidence of age discrimination against the employer.

The decisions of both the EEOC and federal courts to permit voluntary ADEA waivers have been based on the policies behind the ADEA. Throughout the legislative history, the Act's sponsors identified two themes underlying the enforcement provisions. Informal and voluntary resolutions

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[6] None of these cases makes any distinction between a settlement agreement and a termination agreement. In fact, three of the five cases involve "termination agreements" and hold that these agreements preclude an employee's age discrimination claim. Similarly, the EEOC's regulations, 29 C.F.R. § 1627.16, apply equally to termination agreements and settlement agreements.

between employers and employees were to be favored.[7] As the sponsoring senators noted, "the best relationship is voluntary." *Age Discrimination in Employment: Hearings on S. 830 and S. 786 Before the Subcommittee on Labor of the Senate Committee on Public Welfare*, 90th Cong., lst Sess., 89 (1967) (remarks of Sen. Yarborough). The Act should allow the employee to "resolve the dispute himself or work out a compromise with an employer." 123 Cong. Rec. S. 17275 (daily ed. Oct. 9, 1977) (statement of Sen Williams). An equally important policy was the speedy resolution of employment disputes. As Senator Javits stated, the ADEA was designed to avoid the "delays which plagued so many of our agencies" which is "particularly [important] in the case of older citizens to whom, by definition, relatively few productive years are left." *Age Discrimination in Employment, supra* at 24-25. The EEOC found that exchanging a release of age discrimination claims for enhanced severance benefits furthers both these fundamental policies and serves the public interest. *Legislative Regulation and Administrative Exemption Allowing for Non-EEOC Supervised Waivers Under the ADEA*, 52 Fed. Reg. 32,293 (1987) (Appendix F).

The Ninth Circuit opinion rests on one of two premises. According to that opinion, either no dispute yet exists between an employer and employee at the time of termination or voluntary waivers of ADEA claims are contrary to public policy and should be sharply limited. Both premises, however,

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[7] This policy was codified in 29 U.S.C. § 621(b) which declares that the policy of the act is "to help employers and workers find ways of meeting problems arising from the impact of age on employment." The Act also stresses the importance of informal methods of conciliation, conference, and persuasion. 29 U.S.C. § 626(d).

conflict with the decision of other courts of appeals.[8]

If the Ninth Circuit opinion is premised on the lack of a dispute, it conflicts with the *Runyan*, *Lancaster*, *Moore* and *Sullivan* opinions. These cases hold that an ADEA waiver, presented at termination, that is knowingly and voluntarily executed bars any subsequent ADEA claim. Such waivers are enforceable precisely because there is a dispute over the validity of the employee's claim. The disputed claim is necessary for the waiver to fall in the *Gangi* exception permitting voluntary waivers of FLSA claims.[9] By concluding that there is no dispute at the time of termination, the Ninth Circuit opinion directly conflicts with this line of cases.

If the Ninth Circuit opinion is based on a premise that ADEA waivers are contrary to public policy and should be sharply limited, the opinion again conflicts with the *Runyan* line of cases. As noted above, both the federal courts and the EEOC have concluded that such waivers further the public interest and that employers should be encouraged to make such offers.

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[8] One should note that the cases the Ninth Circuit cited to support admissibility, *Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539 (8th Cir.), *cert. denied*, 107 S. Ct. 3212 (1987); *Moore v. McGraw Edison Co.*, 804 F.2d 1026 (8th Cir. 1986); *Sherrod v. Sears Roebuck & Co.*, 785 F.2d 1312 (5th Cir. 1986); *Pruet Production Co. v. Ayles*, 784 F.2d 1275 (5th Cir. 1986), do not support the proposition for which they are cited. In both *Lancaster* and *Moore*, the signed releases were offered by the employer who successfully defeated the employee's age discrimination claim based on the release. In *Pruet*, the employer again offered the settlement agreement as a defense contending that the employee had verbally agreed to the release. The fourth case, *Sherrod*, specifically holds that "Sherrod has not shown any connection between the release and Sears' allegedly discriminatory intent." *Sherrod*, 785 F.2d at 1315.

[9] *See infra* note 19.

Finally, the Ninth Circuit opinion creates a practical conflict among the circuits.[10] In every circuit but the Ninth, employers are encouraged to offer extra contractual benefits in exchange for ADEA waivers. Employees will be free to accept or reject such offers as they see fit. In the Ninth Circuit, however, any employer who makes such an offer runs the risk that the employee will not accept the offer but instead will use the offer itself as *prima facie* evidence of age discrimination. Under such circumstances, employers will be strongly discouraged from making such offers. Accordingly, the Ninth Circuit's opinion creates a practical conflict with opinions of other courts of appeals.

Voluntary releases also further modern industrial relations policy. When an employer faces the difficult task of reducing its work force due to reorganization or declining business, incentives, often in the form of extra-contractual severance benefits, are offered to employees to ease separation from employment. For years, the bar has advised employers to obtain releases of claims from employees in such situations.[11]

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[10] Research has revealed no reported opinion in which a court admitted a settlement agreement and ADEA waiver as evidence of an employer's discriminatory intent. Since Cassino is the first such opinion, it cannot conflict with another circuit on this limited issue. The premises and implications of the Cassino opinion, however, directly conflict with every other appellate opinion on this subject.

[11] *See, e.g.*, Dennis, *Releases: Maintaining Enforceability and Avoiding Litigation*, 12 Empl. Rel. L.J. 46 (1986); Candell, *Waiving ADEA Rights After Runyan v. NCR Corp.*, 11 Empl. Rel. L.J. 322 (1985); Hickey & McCourt, *Quiet Truth in Age Cases Unlikely After Runyan*, "Legal Times," July 16, 1985, p. 18; Richey, *How Using Releases Helps Avoid Age Discrimination Litigation*, Nat'l L.J., June 17, 1985.

This is in simple recognition of the fact that legal disputes are inherent in every termination of employment. By offering special severance packages, employers seek to make the separation amicable and avoid litigation.

Federal courts have split over whether such releases must specifically identify age discrimination claims to be enforceable.[12] Thus, releases are drafted in as comprehensive a form as possible and specifically recite their release of age discrimination claims. By reciting that the employee specifically waives any age discrimination claim, the employer does not, as Cassino argued, indicate a discriminatory motive, but is simply drafting an enforceable release.[13]

Through such releases, terminated employees receive monetary benefits they would not otherwise receive. These benefits are offered, in part, to assist the employee's job search, ease the transition into a new job, and supplement limited unemployment compensation. In reviewing its experience with ADEA waivers, the EEOC found very few employees who were unsatisfied with the offer of extra contractual severance pay in return for an ADEA waiver. Instead, most employees found the proposed exchange to their benefit. In fact, in the only published empirical survey, 92% of the employees executing such waivers were pleased with the bargain they had been offered and had no interest in challenging the validity of

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[12] *Compare EEOC v. United States Steel Corp.*, 583 F. Supp. 1357 (W.D. Pa. 1984) (release must specifically advise employee of claims being waived), *with Runyan v. NCR Corp.*, 787 F.2d 1039 (6th Cir.), *cert. denied*, 107 S. Ct. 178 (1986) (release valid even though ADEA not specifically mentioned in the release).

[13] In fact, for the release to be knowing and voluntary under 29 C.F.R. § 1627.16(c), the agreement must have an understandable written recitation that clearly indicates the employee's waiver of rights or claims under the ADEA. 52 Fed. Reg. 32,293 (1987). (Appendix F)

the release. Silberman & Bolick. *The EEOC's Proposed Rule on Releases of Claims Under the ADEA*. 37 Lab. L.J. 195. 200 (1986).

Employers also benefit by the exchange. For the employer, the settlement creates a predictable cost for a reduction in force. With the current explosion of employment litigation,[14] an employer must protect itself against the enormous costs of defending employment-related litigation, even where such claims would be without merit. An enforceable release provides such protection.

If employers cannot ensure that releases will preclude future litigation, few employers will offer extra contractual severance benefits. Employers have no interest in funding a lawsuit against themselves. For these reasons, the courts and the EEOC have recognized that such exchanges serve the public interest.[15]

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[14] In 1983, for example, 15,000 charges of age discrimination were filed with the EEOC, a 66% increase over the previous year. Daily Lab. Rpt. No. 52 [BNA] at C-1 (March 19, 1985). The number of such claims, as well as the cost of defending those claims, has continued to climb since 1983. As one commentator noted, "employers have begun to view every discharged, age protected employee as a potential ADEA claimant." *Richey, supra* n.11, at 28. Similarly, wrongful discharge litigation under expanding state law standards has made legal challenges to employment terminations the rule, rather than the exception. In such an environment, there can be little question that the utility and enforceability of releases is a critical issue for most employers.

[15] In adopting rules for waivers under the ADEA, the Commission "determined that it is necessary and proper in the public interest to permit waivers or releases under the act . . ." 52 Fed. Reg. 52,293 (1987). (Appendix F)

The Ninth Circuit's decision permitting an offered termination agreement to be used as evidence of age discrimination will not only eliminate these benefits to employers and employees, but also will undermine the policies behind the ADEA. Should this decision stand, terminated employees in the Ninth Circuit will receive whatever benefits they are contractually entitled to (often none), but extra-contractual benefits will not be forthcoming. The 92% of terminated employees who would prefer a termination agreement will no longer have that choice.[16] Employers will lose the ability to predict the cost of a reduction in force. It will no longer be possible to advise employers of the best course of action when economic conditions mandate that employees be terminated. More and more dollars will be spent on litigating age discrimination cases which both the employer and employee wanted to resolve but could not do so short of litigation.

Such a scenario hardly serves the policies behind the ADEA enforcement mechanisms. Informal and voluntary dispute resolution will be discouraged, rather than encouraged, by requiring employees to sue or assert claims against their employer before they may be offered a settlement package. Requiring litigation as a prerequisite to settlement certainly does not enhance the speed of the dispute resolution process. Yet, this is precisely what the Ninth Circuit's decision does by shielding from evidence only those settlement offers made after an actual charge or suit is filed

The Ninth Circuit's decision would also create a conflict in industrial relations practices across the country. Consider, for example, a company whose reduction in force affects facilities across the country. On the West Coast, the laid-off

[16] By contrast, the rules permitting waiver of ADEA claims are "intended to give older workers maximum freedom of choice. To do otherwise would perpetuate the stereotype that older workers need the protection of a paternalistic government." 52 Fed. Reg. 32,293 (1987). (Appendix F)

employees would be offered no extra contractual benefits. Elsewhere, the employees would be free to release their ADEA claims in exchange for additional benefits. When the West Coast employees learn of the offers made elsewhere, they would be told that they must file charges against the company before such offers can be made. This would encourage frivolous claims simply to permit settlement offers to be made with the protection of Fed R. Evid. 408. Such machinations are not good public or labor relations policy.

B. Admitting Evidence of a Proposed Settlement Is Contrary to the Policy Behind Federal Rules of Evidence 403 and 408

The Ninth Circuit held that Fed. R. Evid. 408 did not bar evidence of Reichhold's offered release because there was no actual dispute between Reichhold and Cassino. The Court reasoned that a termination agreement, as opposed to a settlement agreement, occurred before the employee had made any claim against the employer so no actual dispute had arisen. Yet Rule 408 has never been limited to actual disputes. Instead, the Rule has been frequently applied to apparent disputes where offers of compromise were made to avoid litigation. Moreover, the policy behind Rule 408, broadly favoring settlement of disagreements outside litigation, compels exclusion of termination agreement offers. Finally, there is no principled distinction between a termination and settlement agreement since each is designed to compromise the same employment discrimination claim.

Rule 408 has never been limited to actual pending claims between the parties. As one leading commentator notes, the Rule applies both to actual disputes and to situations involving "an apparent difference in view between the parties as to the validity or amount of the claim." E. Cleary, *McCormick on*

Evidence § 274 (3d ed. 1984).[17] An offer of compromise, when made, "to avoid a controversy or to avoid litigation," has long been held to be properly excluded. *Shipley v. Pittsburgh and L.E.R.R.*, 83 F. Supp. 722, 762 (W.D. Pa. 1949). *See also West v. Smith*, 101 U.S. 263, 273 (1879); *Olin Corp. v. Ins. Co of N.A.*, 603 F. Supp. 445, 450 (S.D.N.Y. 1985). Accordingly, Rule 408 covers any offer of compromise regardless of the time of the offer. 2 J. Winestein and M. Berger, *Winestein Evidence* ¶ 408 [07], at 408-31 (Rev. Ed. 1985).

Moreover, the policy behind Rule 408 compels excluding offers of a termination agreement. Rule 408 is designed to encourage non-litigious resolution of claims between the parties. *Reichenvach v. Smith*, 528 F.2d 1072, 1074 (5th Cir. 1976). As the Advisory Committee notes, Rule 408 is designed to encourage settlement of any and all claims between the parties. In the employment context, the claim arises as soon as the employee is informed that he or she is terminated. Since employees rarely acknowledge that they deserve to be terminated, there is an implicit difference of view between the employer and the employee. The termination agreement is designed to settle this disagreement and to resolve finally and fairly any potential claim.[18] As such, both the letter and spirit of Rule 408 require excluding evidence of the proposed termination agreement.

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[17] Curiously, the Ninth Circuit cited *McCormick*, for the proposition that Rule 408 only applies to offers to compromise actual disputes. Although *McCormick* notes that Rule 408 does cover actual disputes, it goes on to note that the rule also applies to apparent disputes. The full text of the cited sentence reads: "To call into play the exclusionary rule [Rule 408], there must be an actual dispute, or at least an apparent difference of view between the parties as to the validity or amount of the claim."

[18] If the termination agreement is unfair, coercive, or overreaching, it would be unenforceable under *Runyan* and 29 C.F.R. § 1627.16(c).

The Ninth Circuit's construction of Rule 408 has wide-ranging consequence in other areas of law. In the construction context, it means that a builder's offer to fix a construction flaw before the owner asserts a legal claim would be admissible to establish that the flaw was caused by the builder's negligence. In a commercial context, it suggests that a supplier's pre-suit offer to correct a performance problem with its goods is admissible to show that those goods did not conform to the contract. In an insurance context, it means that an insurer's pre-claim offer to pay a victim's medical bills would be admissible to show that the insurer conceded liability and coverage. In all these situations, the offer is made after a potential claim has *arisen* but before there is an "actual dispute" between the parties. If Rule 408 only applies to actual disputes, then any settlement offer occurring before some legal action occurs would be admissible to show liability on the offeror's part. Such a construction of Rule 408 cannot be permitted to stand.

Furthermore, there is no logical distinction between termination and settlement agreements. To be sure, the settlement agreement does arise from slightly different circumstances. Other circuit courts and the EEOC, however, treat the two agreements identically. Both agreements will preclude the employee's subsequent age discrimination claim if the agreement was knowingly and voluntarily executed. Both agreements are enforceable precisely because any potential claim would have been disputed as to validity."[19] *See Lancaster,*

[19] If there was no factual dispute as to the validity of the employee's claim, the waiver would be impermissible under *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945), which precludes private waivers of wage claims under The Fair Labor Standards Act ("FLSA"). As the Sixth Circuit noted in *Runyan*, the factual dispute surrounding the motivation for the employee's termination takes the release into the *Schulte, Inc. v. Gangi*, 328 U.S. 108 (1946), exception. 787 F.2d at 1043-44. If, as the Ninth Circuit concluded, there was no dispute between Reichhold and Cassino, an executed termination agreement would be unenforceable under *Brooklyn Savings*. If this is the thrust of the court's opinion, it clearly contradicts every other appellate opinion on this issue, as well as the EEOC's regulations.

809 F.2d at 540 (termination agreement enforceable because of "bona fide factual disputes over the intent and motive of [the] employer"); *Runyan*, 787 F.2d at 1044 ("a bona fide dispute does exist concerning whether the employer discharged Runyan in violation of the ADEA").

If termination agreements are binding and enforceable, there must be some claim existing at the time the agreement was executed, since prospective waivers of discrimination claims are unenforceable.[20] For a claim to exist, there must be some implicit dispute between the employer and employee which is being compromised. If the signed termination agreement compromises a dispute, then the offer of the termination agreement must be an offer to compromise a dispute. It is pure sophistry to suggest that a proposed termination agreement does not offer to compromise a dispute between the employer and the employee. Accordingly, evidence that the employer offered a termination agreement should be precluded by Rule 408.

Even if evidence of this settlement offer were not precluded under Rule 408, it would be precluded by Rule 403. Rule 403 bars evidence where the probative value is outweighed by the danger of unfair prejudice. *See United States v. Epperson*, 528 F.2d 48, 50 (9th Cir. 1975).

A number of courts have held that even where a strict application of Rule 408 might not bar evidence of a settlement, such evidence is barred by Rule 403. *See, e.g., Weir v. Whirlpool Corp.*, 811 F.2d 1387 (10th Cir. 1983); *Pasquale v. Prudential Property & Casualty Co.*, 657 F.2d 269 (6th Cir. 1981); *United Fidelity Life Ins. Co. v. Law Firm of Best, Sharp,*

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[20] *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (Title VII).

Thomas & Glass, 624 F.2d 145 (10th Cir. 1980). These decisions recognize that evidence of settlement offers is perhaps the most unfairly prejudicial evidence that a party could offer. A jury who hears that a defendant has offered to pay "x" dollars because of certain actions is almost certain to conclude that the defendant was somehow at fault in taking those actions.[21] Just as certain, however, is that the settlement offer does not establish the defendant's culpability. Cases are settled for a wide variety of reasons not related to a party's culpability. *See* E. Cleary, *McCormick on Evidence* § 274 (3d ed. 1984).

In this case, the settlement offer was a form release drafted by outside counsel which was used for all terminations, regardless of the employee's age, and was not in any way specifically designed or tailored for Cassino's termination. Instead, offering the release was part of Reichhold's sound and consistent labor relations policy. As such, it lacks any probative value regarding the motivation behind Cassino's termination. It was introduced and used, however, for just this purpose. Accordingly, even if the settlement offer were not barred by Rule 408, it should be barred by Rule 403.

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[21] Respondent cannot seriously question the very severe prejudicial impact of reading the release language to the jury. Indeed, respondent's counsel made the express release of age discrimination claims a focus of his closing argument.

The erroneous admission of the Settlement aggravated many other of Judge Tanner's errors, including the admission of extensive improper and incompetent testimony and the unprecedented order to counsel not to object while improper testimony was being received. The Ninth Circuit labelled these rulings as harmless error, although they resulted in nearly a full day of improper testimony.

II. Front Pay, As An Additional Remedy In Lieu Of Reinstatement, May Not Be Premised Solely On Hostility Created By Litigation

It is beyond dispute that reinstatement, not front pay, is the preferred remedy under the ADEA. Every court of appeals which has considered this question has held that, while front pay may be an appropriate remedy, it is only available where reinstatement, the preferred remedy, is impractical or impossible.[22] Reinstatement is impractical or impossible where the antagonism between employer and employee is so great that reinstatement is not appropriate. *See Wildman v. Lerner Stores Corp.*, 771 F.2d 605 (lst Cir. 1985).

In its decision in this case, the Ninth Circuit upholds front pay based solely on the hostility implicit in vigorously contested litigation. This holding effectively either eliminated the requirement that reinstatement be impossible or impractical or it eliminated the requirement that reinstatement is the preferred remedy or both. Furthermore, by imposing an extraordinary remedy (front pay) solely on the basis of a vigorous litigation defense, the decision chills the employer's right to defend itself and raises serious due process concerns.

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[22] *McNeil v. Economics Laboratory, Inc.*, 800 F.2d 111 (7th Cir.), *cert. denied*, 107 S. Ct. 1983 (1987); *Wildman v. Lerner Stores*, 771 F.2d 605 (1st Cir. 1985); *Maxfield v. Sinclair International*, 766 F.2d 788 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 796 (1986); *EEOC v. Prudential Federal Savings & Loan Ass'n*, 763 F.2d 1166 (10th Cir.), *cert. denied*, 474 U.S. 1005 (1985); *Goldstein v. Manhattan Industries*, 758 F.2d 1435 (11th Cir.), *cert. denied*, 474 U.S. 946 (1985); *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724 (2d Cir. 1984); *Davis v. Combustion Engineering*, 742 F.2d 916 (6th Cir. 1984); *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093 (8th Cir. 1982); *Cancellier v. Federated Department Stores*, 672 F.2d 1312 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982).

No court has previously found that hostilities created in litigation, in and of themselves, justify an award of front pay. To the contrary, this view has been rejected by other courts. *McKelvy v. Metal Container Corp.*, 44 Fair Empl. Prac. Cas. [BNA] 454 (M.D. Fla. 1987) holds that litigation hostilities alone cannot justify an award of front pay in lieu of reinstatement. As the court noted:

> The fact that the action proceeded to trial and was ardently contested by defendant does not, *ipso facto*, show that reinstatement is infeasible. Indeed, if that were the case, reinstatement would rarely, if ever, be an appropriate remedy.

A similar conclusion was reached in *Goldstein v. Manhattan Industries, Inc.*, 758 F.2d 1435 (11th Cir.), *cert. denied*, 106 S. Ct. 525 (U.S. 1985), where the plaintiff's claim for front pay because the "suit engendered such ill feelings that it would be impossible for him to function as an employee of [the employer] again" was rejected since reinstatement was still feasible.

A few decisions have awarded front pay based on hostilities created in litigation, but only where other factors were also present. For example, in *Berndt v. Kaiser Aluminum*, 789 F.2d 253 (3d Cir. 1986), front pay was awarded due to litigation hostilities and the fact that the plaintiff would retire in four months. Similarly, in *Toth v. American Greetings Corp.*, 40 Fair Empl. Prac. Cas. [BNA] 1768 (N.D. Ohio 1985), a Title VII case, front pay was based in part on litigation hostilities and in part on a personality conflict between the plaintiff and her supervisor.

In this case, there is no evidence or finding that reinstatement would be impractical or impossible. Instead, front pay is premised solely on the appeals court's conclusion that "the record indicates that some hostility developed between Reichhold and Cassino during the litigation."[23] 817 F.2d at 1347.

If litigation hostility alone will justify an award of front pay, then front pay will be available in any contested age discrimination action. Instead of being an extraordinary remedy, front pay will become the preferred remedy in every contested ADEA action. Congress, however, intended just the opposite: that reinstatement would be ordered unless special circumstances rendered it inappropriate. Thus, the award of front pay in this case is clearly contrary to congressional intent.

Awarding front pay in every contested case also chills an employer's ability to contest age discrimination claims. Front pay is a far more costly remedy than reinstatement. It is often the largest component of an employee's damage award. Exposing employers to this extraordinary and extremely costly penalty simply because the employer chooses to defend itself vigorously creates an unprecedented disincentive to defend age discrimination claims.

This disincentive also raises serious due process concerns. The right to a vigorous legal defense is a hallmark of our legal profession and our Constitution. How vigorous can one's defense be if the ardency of defense itself exposes a defendant to

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[23] The trial court made no finding that hostility or any other reason made reinstatement an inappropriate remedy. The finding of hostility arising during litigation was first made by the Ninth Circuit.

extraordinary and substantially increased damages? Accordingly, not only does the court's decision impermissibly substitute front pay as the preferred remedy in contested ADEA actions, but it also impermissibly interferes with an employer's right to a vigorous defense. Both issues warrant this Court's review of the front pay award in this case.

CONCLUSION

The Ninth Circuit's opinion will revolutionize industrial relations practice. Informal and voluntary pre-litigation resolutions of ADEA claims will become impossible. No employer will offer such settlements knowing that the offer alone may be used to establish discriminatory intent. Such a result is completely contrary to the congressional intent behind the ADEA. This result is also contrary to the policy of the EEOC and the principles announced by four federal courts of appeals in upholding the enforceability of ADEA releases. The decision will harm both employees and employers throughout the Ninth Circuit. Finally, the decision gives Rule 408 a radical interpretation which raises the possibility that all pre-litigation settlement agreements will be admissible to prove the offeror's liability.

The opinion would also make front pay rather than reinstatement the preferred remedy in contested ADEA cases. Again, this result is diametrically opposed to congressional intent and contrary to the decisions of other courts of appeals. Employers would face a Hobson's Choice whereby a vigorous defense of an age discrimination claim, in and of itself, would impose increased and extraordinary remedies.

Both issues are matters of extreme importance. Whether or not to offer a termination agreement is an issue whenever an employer reduces its workforce. Both the EEOC and federal courts have recognized such termination agreements as serving a vital public interest. By eliminating the usefulness of such agreements and altering the preferred remedial scheme, the Ninth Circuit's decision would dramatically alter modern industrial relations practice. Before that day dawns, petitioner respectfully submits that the writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GERARD A. CASSINO and
SALLY CASSINO,
Plaintiffs-Appellees,

v.

REICHHOLD CHEMICALS, INC.,
a New York corporation,
Defendant-Appellant.

No. 85-4182

D.C. No.
CV-83-762-T

OPINION

Argued and Submitted
March 4, 1987--Seattle, Washington

Filed May 15, 1987

Before: Alfred T. Goodwin,
Mary M. Schroeder and Jerome Farris,
Circuit Judges

Opinion by Judge Schroeder

Appeal from the
United States District Court
for the Western District of Washington
Jack E. Tanner, District Judge, Presiding

SUMMARY

Employment Discrimination/Evidence

Appeal from a jury verdict awarding damages under the Age Discrimination in

Employment Act (ADEA). Affirmed in part, reversed in part and remanded for a new trial on damages.

Gerard Cassino (Cassino) began working for appellant Reichhold Chemicals, Inc. (Reichhold) in 1957, and later became human resources director for the company's western region. After a 1981 reorganization a new management team told employees at a meeting that the company wanted to reduce the average age of its workforce. Later Cassino was fired along with 16 others working for the company's Tacoma, Washington, plant. Fourteen of the employees were over the age of 40. Officials met with Cassino and told him they wanted to handle labor negotiations from their New York office (a 32-year-old man was hired for the position), and offered him a "Settlement Agreement and General Release" offering $18,000 in exchange for

a release of all claims under federal, state or local law. Cassino filed suit in federal court alleging violation of ADEA and a jury awarded him $81,000 in backpay, $150,000 in front pay and $246,000 in liquidated damages.

[1] Federal Rule of Evidence 408 forbids admission of evidence of offers to compromise a claim, but the district court admitted the "Settlement Claim" Reichhold asked Cassino to sign because at the time it was presented for his signature he had not asserted any claim which could be compromised. There was no abuse of discretion in this. [2] Settlement offers arising after an employee asserts that he or she is a victim of illegal discrimination are inadmissible to prove liability under Rule 408, [3] but where the employee is terminated and offered a contemporaneous severance pay package in exchange for a

release of all potential claims such agreements are generally made a part of the record. [4] Reichhold cites no authority that termination agreements such as these are inadmissible. Rule 408 should not be used to bar relevant evidence simply because one party calls its communication with the other a settlement offer. [5] The district court gave jury instructions that correctly stated that the plaintiff must prove that he would not have been terminated "but for his age," and turned down Reichhold's proposed instruction providing that as long as Reichhold states a legitimate reason for the discharge the plaintiff has the burden of proving that his age was a determining factor in the decision and that the stated reason was merely pretextual. [6] This circuit has not yet considered whether it is reversible error not to give such a pretext

instruction, but the Tenth Circuit has squarely rejected this proposition, and in fact held that it would have been error to give a pretext instruction, as it might mislead the jury to believe that the plaintiff must prove that the employer's stated nondiscriminatory reason was false and that age was the sole factor in the decision. [7] The Eighth and Sixth Circuits have approved jury instructions that omitted any mention of pretext and focused only on the plaintiff's burden of proving that the challenged action would not have been taken but for the plaintiff's age. [8] Because the instructions reviewed as a whole set forth the essential elements, the court did not err in refusing to give Reichhold's proposed pretext instructions. [9] Although the court erred in allowing speculative opinion testimony by two lay witnesses that they

were terminated because of age, this was not reversible error.

[10] Regarding the payment of back-pay, the testimony of Reichhold's expert witness as to the reasonableness of Carrion's efforts at mitigation--which was disallowed by the court--was relevant to a disputed issue, and would have assisted Reichhold in carrying its burden of proving a failure to mitigate and in rebutting Cassino's testimony that he searched for other work. It was admissible and its exclusion was prejudicial to Reichhold and an abuse of discretion. [11] The court also erred in instructing the jury on mitigation by not adequately explaining the law. [12] Awards for front pay, to cover the loss of future earnings, must be reduced by the amount the plaintiff could earn using reasonable mitigation efforts. Because the court gave only a cursory

definition of front pay, and no other instructions, the jury's finding that Cassino was entitled to front pay is reversed. [13] The district court did not abuse its discretion in awarding front pay rather than reinstatement. [14] Several circuits have held that expert testimony was not an absolute prerequisite to submitting to the jury the issue of future lost earnings and their reduction to present value. [15] The jury incorrectly computed the amount of liquidated damages. By the express terms of the ADEA, liquidated damages are an additional amount equal to the backpay and benefits award. It is clear that the jury simply doubled the entire award, including the front pay and compensatory damage awards. On remand, after computing the backpay award in light of the duty to mitigate, the jury should be instructed to award as liquidated

damages, if it determines such an award appropriate, an amount not to exceed the backpay and benefits award. Affirmed in part and reversed in part. Damages award vacated and the matter remanded for a new trial on damages.

COUNSEL

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Patrick B. Mooney and Daniel H. Williams, III, Buffalo, New York, and Bart Waldman and Philip S. Morse, Seattle, Washington, for the defendant-appellant.

OPINION

SCHROEDER, Circuit Judge:

Reichhold Chemicals, Inc. appeals a jury verdict awarding Gerard Cassino

$492,000 in damages under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq. Reichhold contends that the trial court made a number of erroneous evidentiary rulings and errors in jury instructions. The principal issues on liability involve the admissibility of Reichhold's proposed "settlement agreement," whether the district court should have given a pretext instruction, and the admissibility of certain lay witness opinion testimony. On damages, we are asked to review the sufficiency of the district court's mitigation instruction, the exclusion of Reichhold's expert testimony regarding Cassino's mitigation efforts, the propriety of the front pay award, and the jury's calculation of liquidated damages. We reverse and remand for a new trial on damages only.

Cassino began working for Reichhold in 1957 as a chemist, and later became human resources director for Reichhold's western region. In 1981 Reichhold's board of directors hired new management to reorganize the company. The division for which Cassino worked was disbanded and its functions were reassigned to other divisions.

Cassino was fifty-two years old in June 1983 when he was one of sixteen employees fired from Reichhold's plant in Tacoma, Washington. Fourteen of the sixteen employees were over the age of forty. Five weeks before Cassino was fired, Reichhold's president and vice president for human resources spoke at a meeting of Tacoma employees. The officers stated, among other things, that the average age of Reichhold employees was forty-seven, that the company was considering improving its pension plan,

and that the company was planning to institute a college recruiting program. The vice president also spoke at a meeting for Reichhold officials held at approximately the same time as the Tacoma employees' meeting, and stated that the company wanted to reduce the average age of its workforce.

Reichhold officials, including the vice president for human resources, met with Cassino and informed him that he was fired and that the company was going to handle labor negotiations from its White Plains, New York, office. During the meeting, Reichhold offered Cassino a document entitled "Settlement Agreement and General Release." The document, which Cassino refused to sign, offered $18,000 in exchange for Cassino's release of all claims against Reichhold "including, but not limited to, rights

under federal, state or local laws prohibiting age or other forms of discrimination . . . ." Shortly after Cassino left the company, Reichhold hired a thirty-two-year-old as its corporate director of labor relations in White Plains.

Cassino filed this suit in federal court alleging that his termination was based on age in violation of the ADEA and Washington's anti-discrimination laws. A jury verdict in Cassino's favor awarded him $81,000 in backpay, $150,000 in front pay, $246,000 in liquidated damages, and $15,000 in damages on state law claims not in issue on appeal.

LIABILITY

A. Termination Agreement

The district court admitted into evidence the "Settlement Agreement and General Release" that Reichhold offered to Cassino at his termination meeting.

We review evidentiary rulings for abuse of discretion and will not reverse absent some prejudice. Kisor v. Johns-Manville Corp., 783 F.2d 1337, 1340 (9th Cir. 1986).

[1] The issue is whether the document was inadmissible under Fed. R. Evid. 408. That rule provides that evidence of offers "to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount." See also E. Cleary, McCormick on Evidence § 274 (3rd ed. 1984) (offers to compromise actual disputes inadmissible). The district court admitted the agreement into evidence because Cassino had not asserted any claim at the time Reichhold asked for the release and, therefore, Rule 408 did not bar its admission. We find no abuse of discretion in admitting the proposed

agreement under the circumstances of this case.

[2] That conclusion follows from our review of many cases arising under the ADEA in which employers have sought releases of claims in return for monetary payment to dismissed employees. Our review reflects that such offers arise in at least two materially distinct contexts. The first is in connection with the negotiation and settlement of disputes arising after the termination. In these cases, an employee relinquishes the right to a judicial determination of an ADEA claim in return for valuable consideration after having asserted that he or she is a victim of illegal discrimination. See In re Lybarger, 793 F.2d 136, 137 (6th Cir. 1986) (settlement of ADEA claim morning of scheduled trial); Runyan v. Nat'l Cash Register Corp., 787 F.2d 1039,

1040-41 (6th Cir.) (en banc) (release of all claims after allegation of age discrimination and acceptance of increased compensation for duration of consulting agreement), cert. denied, 107 S. Ct. 178 (1986). Such settlement offers are inadmissible to prove liability pursuant to Rule 408.

[3] A second situation appearing in ADEA cases, and one more similar to this case, occurs when an employment relationship is terminated and the employer offers a contemporaneous severance pay package in exchange for a release of all potential claims, including claims for discriminatory acts that may have occurred at or before the termination. Such termination agreements are generally made a part of the record in the case and are considered relevant to the circumstances surrounding the alleged discriminatory discharge itself. The

termination agreements, therefore, are probative on the issue of discrimination. See, e.g., Lancaster v. Buerkle Buick Honda Co., 809 F.2d 539, 540 (8th Cir. 1987) (termination agreement offering $39,000 severance pay and six months medical insurance premiums for general release); Moore v. McGraw Edison Co., 804 F.2d 1026, 1028-30 (8th Cir. 1986) (termination agreement offering several employees severance pay for liability release); Sherrod v. Sears, Roebuck & Co., 785 F.2d 1312, 1314-15 (5th Cir. 1986) (termination agreement offering approximately $5,000 in addition to accrued vacation and service allowances for release); Pruet Production Co. v. Ayles, 784 F.2d 1275, 1278 (5th Cir. 1986) (termination agreement offering $120,000 if employee signed release). See generally R. Silberman & C. Bolick, The EEOC's Proposed Rule on Releases of

Claims under the ADEA, 37 Lab. L.J. 195, 195-96 (1986) (discussing distinction between settlement agreements and termination agreements).

[4] Reichhold cites no authority holding that termination agreements such as those cited above are inadmissible. This is no doubt because the protections of Rule 408 were designed to encourage the compromise and settlement of existing disputes. See United States v. Contra Costa County Water Dist., 678 F.2d 90, 92 (9th Cir. 1982); Fed. R. Evid. 408 advisory committee note. See also Runyan, 787 F.2d at 1045 (upholding settlement of ADEA claim through a private, unsupervised release to encourage voluntary resolution of disputes). Where, as here, the employer tries to condition severance pay upon the release of potential claims, the policy behind Rule 408 does not come into play. Rule

408 should not be used to bar relevant evidence concerning the circumstances of the termination itself simply because one party calls its communication with the other party a "settlement offer."

Such communications may also tend to be coercive rather than conciliatory. Thus, courts have observed that while an attempt to mitigate the harshness of a decision to terminate an employee may be commendable, "courts should not allow employers to compromise the underlying policies of the ADEA by taking advantage of a superior bargaining position or by overreaching." Runyan, 787 F.2d at 1044-45. "The remedial goals of the ADEA cannot be circumvented by an employer's coercive practices no matter how subtle the form." Felty v. Graves-Humphreys Co., 785 F.2d 516, 520 (4th Cir. 1986). The district court, therefore, did not abuse its discretion in

admitting the proposed termination agreement here.

B. Pretext Instruction

Reichhold contends that the district court's refusal to give its proposed jury instructions on pretext requires reversal. It argues that the court should have instructed the jury that it was Cassino's burden to prove that the reorganization at the Tacoma plant was a pretext for firing older employees.

To prove a prima facie case of age discrimination, the plaintiff must ordinarily prove that (1) the plaintiff was between forty and seventy years old, (2) the plaintiff was fired, (3) the plaintiff was performing the job satisfactorily, and (4) the plaintiff was replaced by a substantially younger person with equal or inferior qualifications. Palmer v. United States, 794 F.2d 534, 537 (9th Cir. 1986). Once the

plaintiff establishes a prima facie case of age discrimination, the burden of production shifts to the employer to articulate a legitimate non-discriminatory reason for the discharge. Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 24-25, 99 S. Ct. 295, 295-96 (1978) (per curiam). If the employer produces sufficient evidence to rebut the plaintiff's prima facie showing, the plaintiff may attempt to show that the proffered reasons are pretextual. The plaintiff may do so "directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Sutton v. Atlantic Richfield Co., 646 F.2d 407, 412 (9th Cir. 1981) (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S. Ct. 1089, 1095 (1981)).

To prove a violation of the ADEA, the plaintiff must prove that age "made a difference in determining whether or not the plaintiff was retained or discharged." Kelly v. American Standard, Inc., 640 F.2d 974, 984-85 (9th Cir. 1981). See also Cancellier v. Federated Dep't Stores, 672 F.2d 1312, 1316 (9th Cir.) ("it is not enough that age discrimination be present or even that it figure in the decision to fire; age must 'make a difference' between termination and retention"), cert. denied, 459 U.S. 859, 103 S. Ct. 131 (1982). Age, however, need not be the sole factor in a discharge. Id. The jury, therefore, must decide whether age was the "determining factor" in an employer's decision to discharge an individual, or, whether the employee would not have been discharged "but for" his age. Id.; Loeb v. Textron, Inc., 600 F.2d 1003, 1019 (1st

Cir. 1979); Laugesen v. Anaconda Co., 510 F.2d 307, 317 (6th Cir. 1975).

On the issue of liability in this case, the district court instructed the jury as follows:

> This is a suit by plaintiff alleging violations of the Federal and State Laws against age discrimination. These acts make it an unlawful practice for any employer to discharge a person because of that person's age.
>
> . . .
>
> To recover for discrimination in conditions or terms of employment the Plaintiff must prove by a preponderance of the evidence that:
>
> 1. He belongs to a protected group.
>
> 2. He was the subject of age discrimination, and but for his age, he would not have been terminated by the Defendant.
>
> 3. Defendant intentionally discriminated against Plaintiff because of his age.
>
> 4. That as a direct proximate result of such age discrimination, Plaintiff sustained damages.

In evaluating jury instructions, this court considers the charge as a whole to determine whether it is misleading or misstates the law to the prejudice of either party, and will not reverse a judgment because of an erroneous instruction if the instructions fairly and adequately cover the issues. Jenkins v. Whittaker Corp., 785 F.2d 720, 730 (9th Cir.), cert. denied, 107 S. Ct. 324 (1986).

[5] The jury instructions given by the district court below correctly stated that plaintiff must prove that he would not have been terminated "but for his age."[1] Reichhold proposed an

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[1]Reichhold argues that the "but for" instruction was nevertheless inadequate because the district court did not explain to the jury what this standard meant. See Cancellier, 672 F.2d at 1315-16 n.2; Kelly, 640 F.2d at 984-85. Although we are "reluctant" to affirm age discrimination verdicts based on instructions different from those approved in Kelly, we will do so when the error is more probably than not

additional jury instruction, not given by the court, which provided in part: "So long as Reichhold states a legitimate reason for the discharge of Mr. Cassino, Mr. Cassino has the burden of proving that his age was a determining factor in Reichhold's decision and that Reichhold's stated reason was merely a pretext for discrimination." Reichhold argues that because it articulated a legitimate non-discriminatory reason for Cassino's discharge, the Tacoma plant reorganization, it was entitled to a pretext instruction.

[6] This circuit has not yet considered an argument like Reichhold's that it is reversible error not to give

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harmless. Cancellier, 672 F.2d at 1316-17. As in Cancellier, the district court's instruction here was an "unelaborated version of the correct standard," and the district judge's failure to give further guidance as to the meaning of the "but for" test was harmless error. Id.

a pretext instruction. The Tenth Circuit, however, has squarely rejected this contention and held that it would have been error to give a pretext instruction. EEOC v. Prudential Fed. Sav. & Loan Ass'n, 763 F.2d 1166 (10th Cir.), cert. denied, 106 S. Ct. 312 (1985). In Prudential Federal, the court affirmed a trial court's refusal to instruct on pretext. The instruction given, similar to that given in this case, was that the plaintiff must prove that "the age of the employee in question was a determinative factor in defendant's decision to discharge him. That is . . . but for his age, he would not have been so treated." Id. at 1170. The court held that this instruction accurately stated the legal standard. To instruct on pretext, it reasoned further, might mislead the jury to believe that the plaintiff must prove

that the employer's stated non-discriminatory reason was false and that age was the sole factor in the decision. Id. Its reasoning is persuasive. But see Golomb v. Prudential Ins. Co. of America, 688 F.2d 547, 551-52 (7th Cir. 1982) (holding that it was not error to instruct on pretext); Loeb, 600 F.2d at 1017-18 (stating that, where appropriate, jury should be instructed on all steps of McDonnell Douglas formula including pretext).

[7] The Eighth and the Sixth Circuits have approved jury instructions that omitted any mention of pretext and focused only on the plaintiff's burden of proving that the challenged action would not have been taken but for the plaintiff's age. Grebin v. Sioux Falls Indep. School Dist. No. 49-5, 779 F.2d 18, 20-21 & n.1 (8th Cir. 1985); Blackwell v. Sun Elec. Corp., 697 F.2d 1176,

1180 & n.5 (6th Cir. 1983). The jury instructions given in these two cases were similar to, although more detailed than, the instructions given in this case.

[8] As in Grebin and Blackwell, we find no reversible error in the district court's refusal to instruct the jury on pretext. The jury was instructed that it was Cassino's burden to prove that he would not have been fired "but for his age." Because the instructions reviewed as a whole set forth the essential elements that Cassino had to prove in order to prevail, the court did not err in refusing to give Reichhold's proposed pretext instructions. See Jenkins, 785 F.2d at 730.

C. Lay Testimony

[9] Reichhold argues that the district court abused its discretion in allowing two lay witnesses to testify

that they, Cassino, and other Reichhold employees were terminated because of age. Cassino concedes that the court erred in allowing such speculative opinion testimony. See Coca-Cola Co. v. Overland, Inc., 692 F.2d 1250, 1254-55 (9th Cir. 1982); Gray v. Shell Oil Co., 469 F.2d 742, 749-50 (9th Cir. 1972), cert. denied, 412 U.S. 943, 93 S. Ct. 2773 (1973). See also Fed. R. Evid. 602 (requiring witnesses to have personal knowledge of matters about which they testify). The admission of such testimony, however, was not reversible error. Although the witnesses testified that they could think of no reason other than age for the terminations, Reichhold presented extensive testimony regarding another reason, i.e., the company's reorganization.

Similarly, Reichhold's assignment of error to the district court's refusal to

allow oral objections during one-half day of testimony, the exclusion of the video tape shown at the Tacoma employees' meeting, and the admission of Cassino's testimony that Reichhold should have hired him for other positions, if erroneous, do not require reversal. No prejudice has been shown. Kisor, 783 F.2d at 1340; Haddad v. Lockheed Cal. Corp., 720 F.2d 1454, 1459 (9th Cir. 1983).

DAMAGES

Reichhold contends that the district court committed several errors with regard to Cassino's backpay, front pay, and liquidated damage awards. We agree with Reichhold that there were errors that require reversal of the judgment as to damages.

A. Mitigation

An ADEA plaintiff must attempt to mitigate damages by exercising reasonable care and diligence in seeking reemployment after termination. Jackson v. Shell Oil Co., 702 F.2d 197, 201 (9th Cir. 1983). The defendant bears the burden of showing that there were suitable positions available and that the plaintiff failed to use reasonable care in seeking them. Id. at 202. Any wages the plaintiff actually earned after termination, plus the amount the plaintiff would have earned if he had made reasonable efforts, must be subtracted from a backpay award. See Thorne v. City of El Segundo, 802 F.2d 1131, 1137 (9th Cir. 1986); Sangstere v. United Air Lines, Inc., 633 F.2d 864, 867-68 (9th Cir. 1980), cert. denied, 451 U.S. 971, 101

S. Ct. 2048 (1981); Sias v. City Demonstration Agency, 588 F.2d 692, 696-97 (9th Cir. 1978).

Cassino testified at length about his efforts to find another job after Reichhold terminated his employment. Reichhold offered rebuttal expert testimony as to the reasonableness of Cassino's mitigation efforts and the availability of jobs. The district court, however, refused to allow the testimony of Reichhold's expert, William Spartin.

[10] Spartin's testimony was relevant to a disputed issue--the reasonableness of Cassino's mitigation efforts and the availability of jobs. His testimony might have helped the jury to understand how personnel managers generally search for jobs. See Fed. R. Evid. 702 advisory committee note (use of expert testimony determined on basis

of assisting trier of fact); J. Weinstein & M. Berger, Weinstein's Evidence ¶ 702[01] at 702-7 (rev. ed. 1985) (expert testimony helpful to jury should generally be admitted). More important, however, Spartin's testimony would have assisted Reichhold in carrying its burden of proving a failure to mitigate and in rebutting Cassino's testimony that he searched diligently for other work. See Shad v. Dean Witter Reynolds, Inc., 799 F.2d 525, 530 (9th Cir. 1986); Hinqson v. Pacific Southwest Airlines, 743 F.2d 1408, 1412-13 (9th Cir. 1984). The evidence was therefore admissible and its exclusion was prejudicial to Reichhold. The district court's refusal to permit Spartin's expert testimony was an abuse of discretion.

[11] Reichhold also contends that the district court erred in instructing

the jury on mitigation. Cassino concedes that the mitigation instruction was inadequate. It read: "Plaintiff has a duty to mitigate his damages. That is, he has a duty to attempt to earn money from other sources during the time when he was not employed by defendant." This instruction did not adequately explain the law. It did not explain that the jury had to determine whether there were suitable positions available that Cassino could have found and whether Cassino exercised reasonable diligence in seeking them. Jackson, 702 F.2d at 202. In addition, the mitigation instruction did not inform the jury that it should reduce the damage award if it determined that Cassino's efforts to find another job were not reasonable. Sangster, 633 F.2d at 867-68. See Instruction No. 14.05J, Manual of Model Jury Instructions for the Ninth

Circuit (1985).[2] These failures were all prejudicial to Reichhold and require reversal of the backpay award.

B. Front Pay

The ADEA provides that "[i]n any action brought to enforce this chapter the court shall have jurisdiction to

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[2]The model mitigation instruction provides:

> If you find that defendant committed unlawful age discrimination, plaintiff is entitled to damages, consisting of the wages he would have received if defendant had not discharged him. This amount consists of the back wages and employee benefits plaintiff would have received from the date defendant discharged him to the date of this trial. From that amount, you should then subtract the amount of wages, or earnings he received from other jobs during the same period. The amount to be subtracted would also include any severance pay or vacation pay plaintiff received after his discharge.
>
> If defendant proves that plaintiff unjustifiably failed to take a new job of like kind, status and pay which was available to him, or failed to make reasonable efforts to find a new job, you should subtract from his damages any amount he could have earned in a new job after his discharge.

grant such legal or equitable relief as may be appropriate . . . including without limitation judgments compelling employment, reinstatement or promotion . . . ." 29 U.S.C. § 626(b). In discriminatory discharge cases, the decision whether to order reinstatement is within the discretion of the trial court. Cancellier, 672 F.2d at 1319. Although reinstatement is the preferred remedy in these cases, it may not be feasible where the relationship is hostile or no position is available due to a reduction in force. Thorne, 802 F.2d at 1137; Fadhl v. City and County of San Francisco, 741 F.2d 1163, 1167 (9th Cir. 1984); Cancellier, 672 F.2d at 1319. Under such circumstances, an award of future damages or "front pay" in lieu of reinstatement furthers the remedial goals of the ADEA by returning the aggrieved party to the economic situation

he would have enjoyed but for the defendant's illegal conduct. See Prudential Federal, 763 F.2d at 1173; Cancellier, 672 F.2d at 1319. Thus, front pay is an award of future lost earnings to make a victim of discrimination whole. Maxfield v. Sinclair Int'l, 766 F.2d 788, 795-96 (3d Cir. 1985), cert. denied, 106 S. Ct. 796 (1986); Whittlesey v. Union Carbide Corp., 742 F.2d 724, 727-28 (2d Cir. 1984).

The jury in this case was instructed on the measure of damages for front pay. The district court explained that "Front pay is compensation of the loss of future salary and benefits." Aside from this cursory definition, however, the jury was merely told that "If you find age discrimination . . ., you may award front pay."

[12] It is clear that front pay awards, like backpay awards, must be

reduced by the amount plaintiff could earn using reasonable mitigation efforts. See Thorne, 802 F.2d at 1137. As the Third Circuit pointed out in Maxfield, 766 F.2d at 796, the plaintiff's duty to mitigate must serve as a control on front pay damage awards. See also Prudential Federal, 763 F.2d at 1173 (failure to mitigate may limit front pay award); Whittlesey, 742 F.2d at 728 (duty to mitigate significantly limits front pay). Thus, front pay is intended to be temporary in nature. An award of front pay "does not contemplate that a plaintiff will sit idly by and be compensated for doing nothing." Whittlesey, 742 F.2d at 728. The jury in this case, in effect, without instruction on mitigation, found that Cassino was entitled to front pay from the time of trial until the time he would have retired.

Because of this defect, the front pay award also is reversed.

We do not find persuasive Reichhold's remaining challenges to the front pay award. First, Reichhold contends that the district court erred in failing to instruct the jury that a finding of hostility was a prerequisite to a front pay award. The court's failure to instruct on hostility was not error because the decision whether to order the equitable remedy of reinstatement or, in the alternative, to award front pay, is a decision for the trial court. Maxfield, 766 F.2d at 796 (citing Goldstein v. Manhattan Indus., Inc., 758 F.2d 1435, 1448 (11th Cir.), cert. denied, 106 S. Ct. 525 (1985); Davis v. Combustion Eng'g, Inc., 742 F.2d 916, 923 (6th Cir. 1984); Gibson v. Mohawk Rubber Co., 695 F.2d 1093, 1100-01 (8th Cir. 1982)). If the court concludes that

reinstatement is not feasible, the jury then decides the amount of the front pay award. Id.

[13] Moreover, the district court did not abuse its discretion in awarding front pay rather than reinstatement. Notwithstanding Cassino's former supervisor's testimony that he still considers Cassino a friend, the record indicates that some hostility developed between Reichhold and Cassino during the litigation. See Whittlesey, 742 F.2d at 728 (reinstatement inappropriate because of hostility generated by litigation).

Second, Reichhold argues that Cassino failed to present competent evidence establishing future damages. Specifically, Reichhold maintains that Cassino's lay opinion testimony about future earnings and benefits, and the application of inflation and discount rates to those figures, was inadmissible

because Cassino was unqualified to make such calculations.

[14] Although the Ninth Circuit has not addressed the issue of what constitutes adequate inflation and discount rate evidence, several circuits have adopted the view that as long as the jury is properly instructed, expert testimony is not an absolute prerequisite to submitting to the jury the issue of future lost earnings and their reduction to present value. Bonura v. Sea Land Service, Inc., 505 F.2d 665, 668-69 (5th Cir. 1974); Heater v. Chesapeake & O.Ry., 497 F.2d 1243, 1249-50 (7th Cir.), cert. denied, 419 U.S. 1013, 95 S. Ct. 333 (1974); Duncan v. St. Louis-S.F. Ry., 480 F.2d 79, 87 (8th Cir.), cert. denied, 414 U.S. 859, 94 S. Ct. 69 (1973); Baynum v. Chesapeake & O.Ry., 456 F.2d 658, 660-61 (6th Cir. 1972). Contra Ballantine v. Central

R.R., 460 F.2d 540, 543-44 (3d Cir.) (requiring expert or actuarial evidence concerning present value of future loss or mathematical guidance on method of reducing award to present value before submitting issue to jury), cert. denied, 409 U.S. 879, 93 S. Ct. 133 (1972). Courts that do not require expert testimony reason that the effect of inflation and interest rates on the value of money is within the common knowledge of jurors and that jurors are sufficiently intelligent to reduce an award to present value if properly instructed. See Bonura, 505 F.2d at 669; Baynum, 456 F.2d at 661. Here, Reichhold does not dispute the adequacy of the jury instruction on present value, and the record shows that the instruction adequately defined the phrase and sufficiently guided the jury in reducing the front pay award to present value.

Moreover, expert testimony is not required to prove what the plaintiff would receive in future earnings and raises. See Maxfield, 766 F.2d at 797 (plaintiff proved future damages in ADEA suit in absence of expert testimony); Kolb v. Goldring, Inc., 694 F.2d 869, 873 (1st Cir. 1982) (projection of future raises and earnings in ADEA suit can be based on patterns of past increases). Here, Cassino testified about his projected earnings based primarily on his own periodic pay increases during more than twenty years of employment at Reichhold. Therefore, Cassino's evidence was sufficient to establish the loss of future earnings and benefits.

C. Liquidated Damages

Reichhold contends that the award of liquidated damages must be reversed because Cassino did not produce substantial evidence that Reichhold willfully

discriminated against him. See Jackson, 702 F.2d at 200. It also maintains that the jury miscalculated the amount of liquidated damages.

The ADEA expressly incorporates the remedial provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216(b), 29 U.S.C. § 626(b). Under FLSA's remedial provisions, as incorporated into the ADEA, a violating employer is liable for wages and benefits from the date of the wrongful termination until the date of trial, as well as "an additional equal amount as liquidated damages" if the violation was willful. 29 U.S.C. §§ 216(b), 626(b). See Kelly, 640 F.2d at 977-78. A willful violation occurs when the employer "knew or showed reckless disregard" for whether the ADEA prohibited its conduct. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 128, 105 S. Ct.

613, 624 (1985); Gilchrist v. Jim Slemons Imports, Inc., 803 F.2d 1488, 1495 (9th Cir. 1986). Willfulness may be shown by circumstantial evidence, including statistical evidence and discriminatory statements. Kelly, 640 F.2d at 981.

The jury's finding of willful age discrimination is supported by substantial evidence. Almost all of the fired Tacoma employees were over the age of forty. Testimony revealed that several high-level Reichhold officials, including those who fired Cassino, were concerned about the comparatively high average age of Reichhold's workforce and had made public statements to that effect. In addition, the termination agreement that Reichhold offered Cassino specifically required Cassino to waive his right to sue for age discrimination in return for severance pay. From this

evidence, the jury could infer that Reichhold knew or showed reckless disregard of whether firing Cassino violated the ADEA. See Thurston, 469 U.S. at 128, 105 S. Ct. at 624; Gilchrist, 803 F.2d at 1495. See also Archambault v. United Computing Sys., Inc., 786 F.2d 1507, 1514 (11th Cir. 1986) (age-related comments evidence of willfulness).

[15] As Cassino concedes, however, the jury incorrectly computed the amount of liquidated damages. By the express terms of the statute, liquidated damages are an additional amount equal to the backpay and benefits award. 29 U.S.C. §§ 216(b), 626(b). See also Mitroff v. Xomox Corp., 797 F.2d 271, 279 (6th Cir. 1986) (liquidated damages, if awarded, "must be equal to the back pay award") (emphasis in original). Here, the jury was properly instructed that it could award Cassino liquidated damages "up to

an amount equal to unpaid wages to which you find him entitled." Yet, the jury's special interrogatory and verdict form clearly shows that instead of awarding liquidated damages in an amount equal to the $81,000 backpay award, the jury simply doubled the entire award, including the front pay and compensatory damage awards, to reach its $246,000 figure. Accordingly, on remand, after computing the backpay award in light of the duty to mitigate, the jury should be instructed to award as liquidated damages, if it determines such an award appropriate, an amount not to exceed the backpay and benefits award.

The district court is affirmed in part and reversed in part. The award of damages is vacated and the matter remanded for a new trial on damages to be conducted in accordance with this

opinion. Each party is to bear its own costs.

APPENDIX B

NOT FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GERARD A. CASSINO and SALLY CASSINO,	)	No. 85-4182
Plaintiffs-Appellees,	)	D.C. # CV-83-762-T (Western Washington)
REICHHOLD CHEMICALS, INC., a New York corporation,	)	ORDER
Defendant-Appellant	)	

Before: GOODWIN, SCHROEDER, and FARRIS, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

JUDGMENT ON JURY VERDICT

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON AT TACOMA

GERARD A. CASSINO — CIVIL ACTION C83-762T

vs. — FILE NO. ____

REICHOLD CHEMICALS, INC.

This action came on for trial before the Court and a jury, Honorable Jack E. Tanner, United States District Judge, presiding. The issues having been duly tried and the jury having duly rendered its verdict, it is ordered and adjudged

The plaintiff, GERARD A. CASSINO, recover of the defendant, REICHHOLD CHEMICALS, INC. $492,000.

DATED at Tacoma, Washington, this 19th day of July, 1985.

BRUCE RIFKIN, CLERK

/s/ Debby Harrison
Deputy Clerk of Court

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

GERARD A. CASSINO and SALLY CASSINO,	)	
Plaintiff,	)	
vs.	)	NO. C83-762T
REICHHOLD CHEMICALS, INC.,	)	ORDER
Defendant.	)	
REICHHOLD CHEMICALS, INC.,	)	
Counterclaimant,	)	
vs.	)	
GERARD A. CASSINO,	)	
Counterdefendant.	)	

THIS MATTER comes on before the above-entitled Court upon Defendant's Motion for Judgment Notwithstanding the Verdict, and for a New Trial.

Having considered the entirety of the records and file herein, it is now

ORDERED that Defendant's Motion is DENIED.

The clerk of the court is instructed to send uncertified copies of this Order to all counsel of record.

DATED this 30th day of August, 1985.

/s/ Jack E. Tanner
UNITED STATES DISTRICT JUDGE

APPENDIX E

Excerpts from Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 623(a), 626, 628, in effect June, 1983

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful to an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(Pub.L. 90-202, § 4, Dec. 15, 1967, 81 Stat. 603; Pub.L. 95-256, § 2(a), Apr. 6, 1978, 92 Stat. 189; Pub.L. 97-248, Title I, § 116(a) Sept. 3, 1982, 96 Stat. 353.)

§ 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages

and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this

chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under the section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual

action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result

of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed--

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days

after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion.

(e) Statute of limitations; reliance in future on administrative ruling, etc.; tolling

(1) Sections 255 and 259 of this title shall apply to actions under this chapter.

(2) For the period during which the Equal Employment Opportunity Commission

is attempting to effect voluntary compliance with requirements of this chapter through informal methods of conciliation, conference, and persuasion pursuant to subsection (b) of this section, the statute of limitations as provided in section 255 of this title shall be tolled, but in no event for a period in excess of one year.
(Pub.L. 90-202, § 7, Dec. 15, 1967, 81 Stat. 604; Pub.L. 95-256, § 4(a), (b)(1), (c)(1), Apr. 6, 1978, 92 Stat. 190, 191; 1978 Reorg. Plan No. 1, § 2, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat. 3781.)

§ 628. Rules and regulations; exemptions

In accordance with the provisions of subchapter II of chapter 5 of Title 5, the Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or

appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.

(Pub.L. 90-202, § 9, Dec. 15, 1967, 81 Stat. 605; 1978 Reorg. Plan No. 1, § 2, eff. Jan. 1, 1979, 43 F.R. 19807, 92 Stat. 3781.)

APPENDIX F

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
29 CFR Part 1627, reprinted from 52 Fed. Reg. 32,293 (August 27, 1987)

Legislative Regulation and Administrative Exemption Allowing for Non-EEOC Supervised Waivers Under the ADEA

AGENCY: Equal Employment Opportunity Commission.

ACTION: Notice of final rule.

SUMMARY: The Commission hereby provides notice of a legislative regulation and administrative exemption (under section 9 of the Age Discrimination in Employment Act of 1967 (ADEA) and 29 CFR

1627.15) allowing for non-EEOC supervised waivers and releases of private rights under the ADEA.

EFFECTIVE DATE: September 28, 1987.

FOR FURTHER INFORMATION CONTACT:
John K. Light at (202) 634-7643.

SUPPLEMENTARY INFORMATION: Section 9 of the ADEA, 29 U.S.C. 628, grants the Commission broad authority to promulgate interpretive guidelines and legislative regulations on both procedural and substantive matters. Section 9 also authorizes the Commission "to establish such reasonable exemptions to or from any or all provisions of [the ADEA] as [it] may find necessary and proper in the public interest." The Commission

hereby promulgates legislative regulation and administrative exemption under section 9 of the ADEA and 29 CFR 1627.15, allowing for waivers and releases of private rights under the ADEA, 29 U.S.C. 621 et seq.

A Notice of Proposed Rulemaking [NPRM] regarding this rule was published in the Federal Register of Monday, October 7, 1985 (50 FR 40870] with a sixty-day period for public comment. In all 36 written comments were received, with 23 generally supporting the NPRM and 13 generally opposing it. A substantial number of the commenters favoring and opposing the NPRM simply stated this fact without significant substantive discussion.

Because the framers of the ADEA were concerned that delay would prejudice the claims of older workers, one of their

central goals was to insure expeditious resolution of disputes. See 113 Cong. Rec. 7076 (remarks of Sen. Javits); Burns v. Equitable Life Assurance Society, 696 F.2d 21, 24 n.2 (2d Cir. 1982). The Commission believes that requiring government supervision of releases and waivers is at odds with this congressional goal. Accordingly, the Commission has determined that it is necessary and proper in the public interest to permit waivers or releases under the Act without the Commission's supervision or approval, provided that any waivers of ADEA rights in such agreement are "knowing and voluntary." But after considering the comments, the Commission believes it is also important to provide guidance on the standards for determining whether waivers are "knowing and voluntary." The final rule also

makes it clear that waivers of prospective rights or claims will not be permitted and declares that a waiver of the rights to file an EEOC charge is void as against public policy.

Responding to the specific request in the NPRM that comments address whether it is necessary to develop particular standards to determine whether waivers are "knowing or voluntary," commenters were about evenly divided between those who expressed opposition to the wisdom or need for any specific standards and those who believed that some standards are desirable. Those commenters against development of particular standards generally believed that whether a waiver was "knowing and voluntary" could best be determined by the courts on a case-by-case basis as under Title VII or that such standards

would be difficult for the Commission to formulate and would involve the Commission in supervising waivers. Some of the commenters believed that workable standards could not be drawn because of varying factual circumstances involved in waivers.

Those comments favoring the development of standards for "knowing and voluntary" waivers generally thought that such standards would be beneficial in insuring that waivers were transacted in a "knowing and voluntary" manner and thus would avoid later controversy. Several comments in favor of establishing standards included specific suggestions as to standards that should be used. These suggestions included simply citing that the waiver or release was "knowing and voluntary" and giving the employee one week to review the docu-

ment, making specific reference to the issue of "duress," and presenting multiple item lists of considerations. These latter included suggestions that, in addition to those specified above, the waiver or release be written in plain English, provide more than token consideration, not deal with a benefit to which the employee was already entitled, concern only past acts, include a statement that the agreement was not an admission of liability by the employer, and provide that the employee would not file suit.

While the Commission recognizes that the presence or absence of one or more standards would not be dispositive of whether a particular waiver is "knowing and voluntary," it does believe that relevant factors indicative of "knowing and voluntary" action can and should be

articulated in the Final Rule. Thus the rule contains guidance as to what the courts have previously regarded as indicative, and what the Commission is likely to find supportive, in demonstrating that a waiver is "knowing and voluntary."

It should be noted that the indicators or standards listed below are presented as examples, not as limitations, for assessing the validity of waivers. Other factors that are not listed may be used in evaluating "knowing and voluntary" and not all of the following indicators or standards need be present in every case for a waiver to be valid. The Commission wishes to emphasize that waivers challenged as not "knowing and voluntary" will be evaluated on a case-by-case basis and the Commission will

look to the substance, not to the form of the waiver agreement.

Following the principles established under Title VII case law, the Commission would expect valid waivers to incorporate or conform with the following fundamental indicators or standards:

(1) The agreement was in writing, in understandable language, and clearly waived the employee's rights or claims under the ADEA;

(2) A reasonable period of time was provided for employee deliberation;

(3) The employee was encouraged to consult with an attorney.

Another provision in the Notice of Proposed Rulemaking that drew several comments is the sentence that states:

> No such waivers or releases, however, shall affect the Commission's rights and responsibilities to enforce the Act.

Several commenters suggested this sentence be removed or other language substituted, making it clear the Commission will not routinely evaluate waivers but will review waivers of ADEA claims only when a charge is filed or where a waiver is raised during an investigation. In addition, some commenters suggested language stating the Commission will not seek relief for individuals who have "knowingly and voluntarily" executed releases and waivers of their ADEA rights.

After careful assessment of the comments and its enforcement responsibilities, the Commission has concluded that the present language of the provision reserves the necessary maximum flexibility and discretion for the Commission in determining what best serves the public interest in the enforcement of the

ADEA. See Equal Employment Opportunity Commission v. Cosmair, Inc., No. 86-1086 (5th Cir. July 16, 1987).

A number of comments addressed "waivers of prospective rights" and the question of "valid or adequate consideration." In accordance with suggestions made by several commenters, the final rule has been changed to indicate clearly the release of prospective rights or claims will not be permitted nor will consideration be recognized that includes benefits to which the employee is already entitled by law or contract.

In promulgating this rule the Commission has taken into consideration the fact that courts have consistently recognized that Congress has expressed a strong preference for voluntary settlements of employment discrimination

claims and that Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., permits employers and employees to settle disputes by using waiver agreements as long as the waiver of rights and release of potential liability is "knowing and voluntary." Alexander v. Gardner-Denver Co., 415 U.S. 79, 88 n.14 (1981). There is a similar preference for voluntary resolution of disputes under the ADEA. See 29 U.S.C. 626(d) (efforts at conciliation, conference, and persuasion to be made before resort to litigation). The Supreme Court has noted that Title VII and the ADEA share a common purpose and that similar provisions should be similarly interpreted. Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979).

This conclusion is supported by section 2(b) of the ADEA which firmly

established the goal of encouraging "employers and workers [to] find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. 621(b). Moreover, the framers of the Act were concerned that delay would prejudice the claims of older workers and one of their central goals was to insure expeditious resolution of disputes. See 113 Cong. Rec. 7076 (Remarks of Sen. Javits) Burns v. Equitable Life Assurance Society, 696 F.2d 21, 24 n.2 (2d Cir. 1982).

The Commission has concluded that this exemption serves both purposes by allowing amicable resolution of disputes and releases of rights for valuable benefits, without bureaucratic oversight and delay, where such releases are in the mutual interests of both employees and employers. Requiring government

supervision would delay the provision of valuable benefits or additional compensation to older employees who freely choose to release their ADEA rights or claims, and tend to discourage employers from offering such enhanced benefits to older workers. This rule is therefore intended to give older workers maximum freedom of choice. To do otherwise would perpetuate the stereotype that older workers need the protection of paternalistic government.

The exemption does not affect the rights of victims of age discrimination who do not wish to settle their claims. The Commission will ensure that individuals who decline to sign waivers receive all compensation and benefits to which they are otherwise entitled. If an individual wishes EEOC supervision of a settlement, he or she may file an EEOC

charge. Furthermore, it is the Commission's position that a waiver cannot prevent an employee from filing a charge with the Commission (see EEOC v. Cosmair, Inc., No. 86-1806 (5th Cir. July 16, 1987)("A waiver of the right to file a charge is void as against public policy.")), and that older employees are protected from retaliation if they seek to challenge an executed waiver as not knowing and voluntary or otherwise invalid.

Section 7(b) of the ADEA, 29 U.S.C. 626(b), incorporates the enforcement provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 et seq. In Lorillard v. Pons, 434 U.S. 575 (1978), the Supreme Court held that not only the FLSA enforcement provisions but also pre-ADEA case law dealing with enforcement of FLSA rights were incorporated

into ADEA section 7(b). While the FLSA like the ADEA is silent on whether an employee can release his or her rights under the Act, the case law on contractual waivers of FLSA rights does not permit waivers of bona fide disputes as to coverage or liquidated damages without government supervision. Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945); Schulte, Inc. v. Gangi, 328 U.S. 108 (1946).

However, the Commission believes the enforcement provisions for the FLSA that are incorporated into the ADEA must be viewed in the context of the different policy considerations underlying the two acts. Cf. United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826, 861 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976)(The O'Neil-Schulte line

of cases "were tied closely to the mandatory terms of particular statutes, the labor conditions that produced those statutes, and what the Court believed was a clearly discernible congressional intent.") The FLSA is a minimum wage statute. The factual issues in FLSA cases concern the number of hours worked and the rate of pay and are generally "amenable to determination with some precision." (Runyan v. National Cash Register Corp., 787 F.2d 1039, 1044 n.8 (6th Cir. 1986), cert. denied, 107 S. Ct. 178 (1986)); under the FLSA there is an absolute presumption that any unsupervised waivers of minimum wage rights would necessarily be against public policy (see Brooklyn Savings Bank v. O'Neil, supra). There is no such presumption under Title VII. United States v. Allegheny-Ludlum Industries, Inc.,

supra; Rogers v. General Electric Co., 781 F.2d 452 (5th Cir. 1986) ("A general release of Title VII claims does not ordinarily violate public policy.") The substantive rights protected by the ADEA are closely analogous to the rights protected by Title VII. Moreover, as earlier noted, the ADEA and Title VII share a common purpose of encouraging the voluntary expeditious resolution of disputes. Accordingly, the Commission believes that mandatory government supervision of ADEA releases would not serve the purpose of the ADEA and that unsupervised ADEA releases, like Title VII releases, should be permitted provided they are knowing, voluntary and non-prospective, as required under the standards governing Title VII releases.

Recently, the Sixth Circuit Court of Appeals sitting en banc held that an

unsupervised release of an ADEA claim in a bona fide factual dispute could be valid. Runyan v. National Cash Register Corp., 787 F.2d 1039, cert. denied, 107 S. Ct. 178 (1986). The court reasoned that where the dispute is a factual rather than a legal one, O'Neil and Gangi do not preclude an unsupervised waiver or release under FLSA or ADEA. Accord Equal Employment Opportunity Commission v. Cosmair, Inc., No. 86-1806 (5th Cir. July 16, 1987); Lancaster v. Buerkle Buick Honda Co., 809 F.2d 539 (8th Cir. 1987); Moore v. McGraw Edison Co., 804 F.2d 1026 (8th Cir. 1986).

The Commission agrees with the rationale and holding of the Sixth Circuit's Runyan en banc decision with regard to unsupervised waivers under the ADEA and has incorporated that approach

in the final rule. The Commission believes that the reasoning of the Runyan en banc decision responds to those commenters who felt that the ADEA does not permit unsupervised waivers because the FLSA enforcement provisions that it largely incorporates allow no such waivers. To the extent that any circuit court decision could be read to conflict with the Runyan en banc decision (see Lynn's Food Stores, Inc. v. United States Dept. of Labor, 679 F.2d 1350, 1354-55 (11th Cir. 1982) (where supervised waivers are held to be an exclusive alternative to litigation or court-supervised settlement for all FLSA claims)) the Commission's exemption authority under section 9 of the ADEA is being utilized to permit unsupervised waivers in those jurisdictions.

The Commission has determined that the remedial purposes of the Act will be best served by allowing the use of waiver agreements to resolve claims whenever employees and employers perceive them to serve their mutual interests, provided that any waivers of ADEA rights in such agreements are "knowing and voluntary." Either a clear understanding of the nature of the rights being waived or the presence of an asserted claim satisfy an initial element of whether a waiver is knowing. It is the Commission's position that a release may be valid as to claims of which a signing party has actual knowledge and those that could have been discovered upon reasonable inquiry. See Oglesby v. Coca-Cola Bottling Co., 620 F. Supp. 1336, 1342 (N.D. Ill. 1985).

The Commission will apply the same standards that are applicable under current Title VII case law to ADEA waivers. Under Title VII, waivers are deemed to be "knowing and voluntary" if they clearly provide actual notice of the nature of the rights that are waived and are fully negotiated without fraud or duress. See Rogers v. General Electric Co., 781 F.2d 452 (5th Cir. 1986); Pilon v. University of Minnesota, 710 F.2d 466 (8th Cir. 1983); Lyght v. Ford Motor Co., 643 F.2d 435 (6th Cir. 1981); EEOC v. T.I.M.E.--D.C. Freight, Inc., 659 F.2d (5th Cir. 1981); Cox v. Allied Chemical Corp., 538 F.2d 1094 (5th Cir. 1976), cert. denied, 434 U.S. 1051 (1978); Watkins v. Scott Paper Co., 530 F.2d 1159 (5th Cir. 1975). Relevant factors that courts have previously regarded as indicative and that the

Commission is likely to find supportive in demonstrating that a waiver was entered into in a "knowing and voluntary" manner are set forth in the final rule. Similarly, the Title VII case law prohibition against recognizing a waiver of future or prospective claims (e.g., a waiver agreement dated January 1 of a given year is not applicable to claims arising after that date) will have full application to ADEA waivers. Alexander v. Gardner-Denver Co., 415 U.S. at 51; United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826, 856 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976). In addition, the Commission will require that consideration in exchange for a valid waiver under the ADEA not include employment benefits to which the employee is already entitled either by law or contract. See Runyan v. NCR

Corp., 573 F. Supp. 1454, 1460 (S.D. Ohio 1983), aff'd, 787 F.2d 1039 (6th Cir. 1986), cert. denied, 107 S. Ct. 178 (1986).

Further, while the Commission takes the position that a waiver, if valid, may be a defense to any claim for individual relief for the employee who signed it, such a waiver cannot be used to justify interfering with an employee's protected right to file a charge or participate in a Commission investigation. Equal Employment Opportunity Commission v. Cosmair, No. 86-1806, slip op. at 5145 (5th Cir. July 16, 1987). The right to file a charge and participate in a Commission investigation is absolutely protected because it is essential to the Commission's enforcement of the ADEA. Id. The plain language of

section 4(d) of the ADEA makes it unlawful for an employer to take action against an employee because he has, inter alia, filed a charge. See Id. at 5144. The enforcement policies underlying the ADEA strongly support this position. Equal Employment Opportunity Commission v. Cosmair, No. 86-1806 (5th Cir. July 16, 1987); see Pettway v. American Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969).

The Commission hereby provides notice that it is adopting a legislative rule and exemption allowing non-EEOC supervised waivers and releases of private rights as an exemption to the provisions of section 7 of the ADEA for any waiver of rights or release from liability by an employee or job applicant

under the Act that is knowing, voluntary, and in conformity with the other requirements of this rule.

Impact Analysis--Classification-Executive Order 12291

The rule in this document is not classified as a "major rule" under Executive Order 12291 on Federal Regulations, because it is not likely to result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or

export markets. Accordingly, no regulatory impact analysis is required.

Similarly, the Chairman of the EEOC certifies under 5 U.S.C. 605(b), enacted by the Regulatory Flexibility Act (Pub. L. 96-354), that this amendment will not result in a significant impact on a substantial number of small employers.

List of Subjects in 29 CFR Part 1627

Equal employment opportunity, Reporting and recordkeeping requirements.

Accordingly, the Commission amends 29 CFR Part 1627 as follows:

PART 1627--[AMENDED]

1. The authority citation for Part 1627 is revised to read as follows:

Authority: Sec. 7, 81 Stat. 604; 29 U.S.C. 626; sec. 9, 81 Stat. 605; 29 U.S.C. 628; sec. 11, 52 Stat. 1066, as amended, 29 U.S.C. 211; sec. 2, Reorg. Plan No. 1 of 1978, 43 FR 19807.

2. Paragraph (c) is added to § 1627.16 as follows:

§ 1627.16 Specific exemptions:

* * * * *

(c)(1) Pursuant to the authority contained in section 9 of the Act and in accordance with the procedure provided therein and in § 1627.15(b) of this part, it has been found necessary and proper in the public interest to permit waivers or releases of claims under the Act without the Commission's supervision or approval, provided that such waivers or releases are knowing and voluntary, do not provide for the release of prospective rights or claims, and are not in exchange for consideration that includes employment benefits to which the employee is already entitled.

(2) When assessing the validity of a waiver agreement, the Commission will

look to, and is likely to find supportive, the following relevant factors that courts have previously identified as indicative of a knowing and voluntary waiver:

(i) The agreement was in writing, in understandable language, and clearly waived the employee's rights or claims under the ADEA;

(ii) A reasonable period of time was provided for employee deliberation;

(iii) The employee was encouraged to consult with an attorney.

These are not intended as exclusive nor must every factor necessarily be present in order for a waiver to be valid, except that a waiver must always be in writing. Moreover, even where these three factors are present, if a waiver is challenged, the Commission will look to the substance and circumstances to

determine whether there was fraud or duress.

(3) No such waivers or releases shall affect the Commission's rights and responsibilities to enforce the Act. Nor shall such a waiver be used to justify interfering with an employee's protected right to file a charge or participate in a Commission investigation.

Signed this 6th Day of August at Washington, DC.

For the Commission.

Clarence Thomas,
Chairman, Equal Employment Opportunity Commission.

[FR Doc. 87-19547 Filed 8-26-87; 8:45 am]
BILLING CODE 6570-06-M

APPENDIX G

SETTLEMENT AGREEMENT AND GENERAL RELEASE

THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE is made and entered into by and between Gerald Cassino (hereinafter referred to as "Employee") and Reichhold Chemicals, Inc. (hereinafter referred to as the "Company").

W I T N E S S E T H:

WHEREAS, Employee was employed by the Company from May 20, 1957 to June 30, 1983; and

WHEREAS, Employee's active services for the Company have terminated or will terminate on June 30, 1983; and

WHEREAS, Employee and the Company desire to settle fully and finally all differences between them, including, but in no way limited to, any

differences that might arise out of Employee's employment with the Company, and the termination thereof;

NOW, THEREFORE, in consideration of the premises and mutual promises herein contained, it is agreed as follows:

FIRST: This Settlement Agreement and General Release shall not in any way be construed as an admission by the Company that it has acted wrongfully with respect to the Employee or any other person, or that the Employee has any rights whatsoever against the Company, and the Company specifically disclaims any liability to or wrongful acts against Employee or any other person, on the part of itself, its employees or its agents.

SECOND: Employee represents, understands and agrees that his active employment with the Company has terminated or will terminate on June 30, 1983, that he will not be reemployed by the Company, and that he will not apply for or otherwise seek employment with the Company at any time.

THIRD: Employee represents that he has not filed any complaints or charges or lawsuits against the Company with any governmental agency or any court, and that he will not do so at any time hereafter; provided, however, this shall not limit Employee from filing a lawsuit for the sole purpose of enforcing Employee's rights under this Settlement Agreement and General Release.

FOURTH: The Company will pay the Employee one week's salary for

every year of service prorated not to exceed 26 weeks. For Employees in the age bracket 45 to 49, a factor of (1.25x) and for Employees over the age of 50, a factor of (1.50x) is used to determine the separation amount, not to exceed 26 weeks, which is the maximum payment. In your case, the Company has determined that you are entitled to $18,000. plus accrued but unused vacation which will be paid forthwith.

FIFTH: Employee understands and agrees that effective June 30, 1983, he was and is no longer authorized to incur any expenses or obligations or liabilities on behalf of the Company.

SIXTH: Employee understands and agrees that under the Company's Group Life Insurance Program, he will be covered through June 30, 1983, and that

he must contact the Employee Benefits Department in White Plains within 30 days of termination if he desires to have an individual policy issued.

SEVENTH: Employee understands and agrees that he will immediately turn over to the Company all files, company property, company vehicles, memoranda, records, credit cards and other documents, physical or personal property which Employee received from the Company and which are the property of the Company.

EIGHTH: Employee understands and agrees that in the course of employment with the Company, he has acquired confidential information and trade secrets concerning the Company's operations, its future plans and its methods of doing business, including, by

way of example, but by no means limited to, highly proprietary information about the Company's customers, product development, research, technology, financial, marketing, pricing, cost, compensation and other matters (hereinafter collectively "Trade Secrets"), all of which information Employee understands and agrees would be extremely damaging to the Company if disclosed to a competitor or made available to any other person or corporation. As used herein, the term "competitor" includes, but is not limited to, any corporation, firm or business engaged in a business similar to that of the Company or its subsidiary companies. Employee understands and agrees that such information has been divulged to Employee in confidence and Employee understands and agrees that he will keep such information secret and

confidential, and Employee further understands and agrees that, at all times, he will not disclose or communicate Trade Secrets or other secret and confidential information to either a competitor or any other person or in any way make such information available to others, or make use of such information on Employee's own behalf, or on behalf of any competitor. Employee further agrees that he will not solicit or participate in or assist in any way the solicitation of any other employees or customers of the Company or of any of its subsidiary companies. In view of the nature of Employee's employment and the information and Trade Secrets which Employee has received during the course of his employment, Employee likewise agrees that the Company would be irreparably harmed by any violation, or threatened violation of this Agreement

and that, therefore, the Company shall be entitled to an injunction prohibiting Employee from any violation or threatened violation of this Agreement. The undertakings set forth in this paragraph shall survive the termination of other arrangements contained in this Agreement.

NINTH: It is agreed that the benefits contained in this Settlement Agreement and General Release which flow to Employee from the Company are subject to termination, reduction or cancellation in the event that Employee takes any action or engages in any conduct deemed by the Company to be in violation of this Agreement.

TENTH: Moreover, the provisions of this Agreement are severable, and if any part of it is found to be unenforceable, the other paragraph shall

remain fully valid and enforceable. This Agreement shall survive the termination of any arrangements contained herein.

ELEVENTH: Employee represents and agrees that he will keep the terms, amount and fact of this Settlement Agreement and General Release completely confidential, and that he will not hereafter disclose any information concerning this Agreement and General Release to anyone.

TWELFTH: Employee represents and agrees that he fully understands his right to discuss all aspects of this Settlement Agreement and General Release with his private attorney, that to the extent, if any, that he desired, he has availed himself of this right, that he has carefully read and fully

understands all of the provisions of this Settlement Agreement and General Release, and that he is voluntarily entering into this Settlement Agreement and General Release.

THIRTEENTH: As a material inducement to the Company to enter into this Settlement Agreement and General Release, Employee hereby irrevocably and unconditionally releases, acquits and forever discharges the Company and each of the Company's owners, stockholders, predecessors, successors, assigns, agents, directors, officers, employees, representatives, attorneys, divisions, subsidiaries, affiliates (and agents, directors, officers, employees, representatives and attorneys of such parent companies, divisions, subsidiaries and affiliates), and all persons acting by, through, under or in concert with any of

them (collectively "Releases"), or any of them, from any and all charges, complaints, claims, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts and expenses (including attorneys' fees and costs actually incurred) of any nature whatsoever, known or unknown, suspected or unsuspected, including, but not limited to, rights under federal, state or local laws prohibiting age or other forms of discrimination, claims growing out of any legal restrictions on the Company's right to terminate its employees ("Claim" or "Claims"), which Employee now has, owns or holds, or claims to have, own or hold, or which Employee at any time heretofore had, owned or held, or claimed to have, own or hold, or which Employee at any time hereinafter

may have, own or hold, or claim to have, own or hold, or claim to have, own or hold against each or any of the Releasees.

FOURTEENTH: As a further material inducement to the Company to enter into this Settlement Agreement and General Release, Employee hereby agrees to indemnify and hold each and all of the Releasees harmless from and against any and all loss, costs, damages, or expenses, including, without limitation, attorneys' fees incurred by Releasees, or any of them arising out of any breach of this Settlement Agreement and General Release by Employee or the fact that any representation made herein by Employee was false when made.

FIFTEENTH: Employee represents and acknowledges that in executing

this Settlement Agreement and General Release he does not rely and has not relied upon any representation or statement not set forth herein made by any of the Releasees or by any of the Releasees' agents, representatives, or attorneys with regard to the subject matter, basis or effect of this Settlement Agreement and General Release or otherwise.

This Settlement Agreement and General Release sets forth the entire agreement between the parties hereto, and fully supersedes any and all prior agreements or understandings between the parties hereto pertaining to the subject matter hereof.

PLEASE READ CAREFULLY. THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE

INCLUDES A RELEASE OF ALL KNOWN AND UNKNOWN CLAIMS.

Executed at Tacoma, Washington

this ___ day of _____, 19__

_____

Executed at _____,

this _____ day of _____, 19__

REICHHOLD CHEMICALS, INC.

By_____

APPENDIX H

HONORABLE JACK E. TANNER

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

GERARD A. CASSINO and SALLY CASSINO, Plaintiffs, vs. REICHHOLD CHEMICALS, INC., a New York Corporation, Defendant,	NO. C83-762T MOTION IN LIMINE OF DEFENDANT REICHHOLD CHEMICALS, INC. TO BAR REFERENCE TO OR EVIDENCE OF SETTLEMENT AGREEMENT AND GENERAL RELEASE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF
REICHHOLD CHEMICALS, INC., Counterclaimant, vs. GERARD A. CASSINO, Counterdefendant.	

MOTION IN LIMINE

Reichhold Chemicals Inc. ("defendant") moves the Court for an order in limine directing that plaintiff Gerard

A. Cassino and Sally Cassino ("plaintiffs") and their counsel be precluded at trial from making reference to, or attempting to introduce evidence of, the existence of Reichhold's proffered settlement agreement and general release extended to Gerard A. Cassino at the time he was terminated or shortly thereafter.

MEMORANDUM SUPPORTING MOTION IN LIMINE

1. The Settlement Agreement and General Release Is An Offer of Settlement or Compromise And Should Be Excluded Under FRE 408.

At the meeting when Mr. Cassino's employment with defendant was terminated, Mr. Cassino made it clear that he disputed the grounds of his termination.

Q. Isn't it a fact that you said at the meeting I am not going to take this, I will see you in court?

A. You mean at the meeting with those three guys?

Q. Yes.

A. I could have said that. I won't deny it.

Q. You can't deny that, right?

A. I may have said that. That was dumb. I warned them. I may have said that. I don't deny that.

Plaintiff's Deposition at 344.

At the same meeting at which plaintiff "warned" defendant that he disputed the grounds of his termination, he was given the document entitled "Settlement Agreement and General Release," which is listed by plaintiffs in the Pretrial Order as Plaintiff's Exhibit No. 5. The document was offered to Mr. Cassino as an attempt to settle any disputes arising out of his termination. Mr. Cassino was given the document and advised to take it to an attorney and read it before he signed it. See Plaintiff's Deposition at 345. Mr. Cassino did not sign the document, Id., and he now attempts to introduce it in a case arising

out of one of the very disputes that the document attempted to settle.

Federal Rule of Evidence 408, Compromise and Offers to Compromise, makes inadmissible precisely what Mr. Cassino is attempting to introduce here. "Evidence of (1) furnishing or offering or promising to furnish . . . a valuable consideration in compromising or attempting to compromise a claim which was disputed as to . . . validity . . . is not admissible to prove liability for . . . the claim. . . ."

The Settlement Agreement and General Release offered by Reichhold meets the letter of Rule 408. The company offered $18,000 in separation pay for the settlement and release of all claims arising out of Mr. Cassino's separation. The document therefore represents an offer to furnish valuable consideration

in attempting to compromise a claim which was disputed as to its validity.

The aim of FRE 408 "is promotion of the public policy favoring the compromise and settlement of disputes." Notes of Advisory Committee on Proposed Rules, Federal Rule of Evidence 408. It is consistent with the goals of FRE 408 that Reichhold not be discouraged from attempting to settle disputes out of court which arise from termination of its employees for fear that the settlement offers it makes could be used against it later in court. The rule was designed to address the very situation which is now presented to the Court. Simply because Mr. Cassino chose not to accept Reichhold's offer of settlement, he must not be able to use that offer to try to establish his case in the present action.

2. The Settlement Agreement and General Release Is Offered Without Proper Foundation, Irrelevant, and Unduly Prejudicial.

Defendant anticipates that plaintiffs will introduce the Settlement Agreement and General Release to show that the inclusion of a release from age discrimination claims somehow supports their cause of action.

a. Admission of the Settlement Agreement and General Release Would Lack Proper Foundation

Plaintiffs have no evidence whatsoever regarding who was responsible for having the Settlement Agreement and General Release drafted or why it was drafted at all. Plaintiff has not established and cannot establish that there is any nexus or connection whatsoever between (1) the person who requested that a form settlement agreement be drawn up for terminated employees, (2) the person who chose for whatever

reasons to include the language which is found in the agreement, (3) the persons who decided to terminate plaintiff's employment, and (4) the reasons why plaintiff's employment was terminated.

b. The Settlement Agreement and General Release Must be Excluded Because It Is Irrelevant

Federal Rule of Evidence 401 defines "relevant evidence" as meaning "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Federal Rule of Evidence 402 provides that evidence which is not relevant is not admissible.

The fact that Reichhold offered plaintiff a settlement agreement which included a release of age discrimination claims amongst a host of other possible claims does not make any consequential fact more probable than it would be

without such evidence. The only fact which could be established by the introduction of the settlement agreement is that Reichhold employs the services of thorough attorneys who try to meet the requirements of a global release. This fact is entirely without probative value to plaintiff's age discrimination claim. For that reason, evidence in reference to the settlement agreement is irrelevant and should not be admitted into evidence.

c. Any Probative Value of the Settlement Agreement and General Release Is Substantially Outweighed by Its Prejudicial Effect

Even were the Court to find that the Settlement Agreement and General Release were somehow relevant to plaintiffs claims, the document must be excluded under Federal Rule of Evidence 403. FRE 403 provides that, "although relevant, evidence may be excluded if its

probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

As demonstrated in the preceding sections, the probative value of this Settlement Agreement and General Release is minimal, if at all. Against this must be weighed the inevitably prejudicial effect on a layperson of an exhaustive, comprehensive settlement and release document. Included in the settlement agreement are numerous provisions and protections for the company which would appear excessively burdensome to a person unfamiliar with releases and which would raise issues in the jury members' minds which have no connection whatsoever to plaintiff's age

discrimination claims. The admission of this document would not only unfairly prejudice the jury against defendant, but it would also lead to a confusion of the issues, undue delay, and waste of the time necessary to read and fully understand it. Furthermore, focusing on only one of many types of claims being released grossly distorts the purposes of the document and unduly prejudices the defendant.

The court has not only the power, but the duty as well, to exclude argument or evidence where its probative effect is outweighed by its prejudice to the opposing party. U.S. v. Epperson, 528 F.2d 48 (9th Cir. 1975). Similarly, where evidence is confusing or misleading, its admission may constitute reversible error. U.S. v. Castell, 584 F.2d 84 (5th Cir. 1978), cert. denied 440 U.S 925 (1978); Brandom v. U.S., 432 F.2d

1391 (7th Cir. 1970), cert. denied, 400 U.S. 1022 (1970).

CONCLUSION

Defendant moves the Court in limine to exclude from the evidence at trial Reichhold's proffered settlement agreement and general release extended to Mr. Cassino at the time he was terminated or shortly thereafter. The document represents an offer by Reichhold to settle all claims arising out of the termination of Mr. Cassino's employment, including Mr. Cassino's present cause of action. Plaintiffs can establish no proper foundation for the admission of this evidence. It is irrelevant to any fact that is of consequence to the determination of this action. Furthermore, even were it relevant, its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, undue delay, and

waste of time. The Court should, therefore, exclude Plaintiff's Exhibit No. 5 from being admitted into evidence and order and direct plaintiffs and their counsel to refrain from making any reference to it during trial of this action.

DATED THIS 15th day of July, 1985.

Respectfully Submitted

PAUL, HASTINGS,
JANOFSKY & WALKER

By_____
Daniel H. Williams

PERKINS COIE

By_____
Bart Waldman

Attorneys for Defendant
Reichhold Chemicals, Inc.

APPENDIX I

Trial Transcript: Argument and Decision re: Motion in Limine (CR 115, Transcript Volume I, pp. 5-23).

THE COURT: Well, let's take up the motions.

MR. WILLIAMS: Alright. Your Honor --

THE COURT: Which one do you want to take first?

MR. WILLIAMS: I think, probably, Your Honor, the one I would like to take first would be the one with reference to the settlement agreement.

THE COURT: Does the Plaintiff intend to present anything on settlement agreement?

MR. McGAVIN:[1] Yes, Your Honor.

THE COURT: Under what rule?

MR. McGAVIN: It's been identified in exhibit in the pre-trial order.

THE COURT: Under what rule?

MR. McGAVIN: Well, they're trying to exclude under 408, Your Honor. I think what you should be aware of is that there was no settlement agreement entered into. At the time Mr. Cassino was terminated, a document called a -- it's our Exhibit No. 5, the proposed settlement agreement and general relief, was profferred to Mr. Cassino along with an offer of $18,000.00. And, in exchange for signing that, in a

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[1]This transcript is reproduced verbatim, without correction of court reporter errors. For example, the correct name of plaintiff's counsel should be "Mr. McGavick."

consideration for the 18,000.00., Mr. Cassino would not bring any causes of action for -- including age discrimination. That was the only type of discrimination that was mentioned in the paragraph 13 of that document.

MR. WILLIAMS: Your Honor, we have three separate objections to the settlement agreement. And, I think the facts surrounding the offer of the settlement agreement are extremely important. At Mr. Cassino's termination meeting where he was handed the settlement agreement, he said, "I'll see you in Court." "I'm not going to take this. I'll see you in Court." At that time, a dispute existed between the parties, and he was offered a settlement agreement to settle all the claims between the parties. Now, rule 408 specifically provides that offers of

settlement cannot be received in evidence because they don't prove liability. They are extremely inflammatory and extremely prejudicial. The only reason that this settlement agreement is being offered is to prejudice the jury. There is no probitive value in this thing at all.

THE COURT: Well--

MR. WILLIAMS: It's right within rule 408.

THE COURT: How about admission against interest?

MR. WILLIAMS: Well, Your Honor, before you can have an admission against interest, the rule is that you have to prove:

Number one, somebody was authorized to make an admission.

Number two, you have to prove that it was an admission.

And, number three, it has to relate to some of the subject matter in the dispute between the parties.

THE COURT: That's --

MR. WILLIAMS: Now, taking those elements, there's no admission by offering a settlement agreement to somebody. What's the admission?

THE COURT: Well --

MR. WILLIAMS: We have a dispute?

THE COURT: Is it a settlement agreement under rule 408?

MR. WILLIAMS: Pardon?

THE COURT: Is it a settlement agreement under rule 408?

MR. WILLIAMS: Yes, sir. He said, "I'll take you to Court. I'll see you in Court." We offered him a settlement agreement. We offered him $18,000.00. in the settlement agreement.

THE COURT: What you're saying then, anything that your client might have said to the Plaintiff was a settlement agreement without a lawsuit being filed.

MR. WILLIAMS: No sir, I'm not saying that at all, Your Honor.

THE COURT: Well, you have to be.

MR. WILLIAMS: No, I don't believe so, sir. I think what I'm saying is, is that we offered him at the time of his termination six months pay in the settlement agreement.

THE COURT: When does 408 take effect?

MR. WILLIAMS: When does -- 408 takes effect at the time it's offered for evidence in trial. It has been offered --

THE COURT; Well, 408, it seems to me, to take effect after the lawsuit is filed. Isn't that correct?

MR. WILLIAMS: No, sir. I don't think so. I think it takes effect when there --

THE COURT: You don't think so?

MR. WILLIAMS: I don't. I think it takes effect when there is a known dispute between the parties. As an example, 408 reads:

'Evidence -- the evidence that is excluded is; one, furnishing, or offering, or promising to furnish a valuable consideration, in compromising or attempting to compromise a claim which was disputed.'

Now, we dispute, and we always did dispute that it's not true that age was a factor in Mr. Cassino's termination. We offered to settle any claims that he

had, any claims that he had, not just age, in return for a six month payment of salary.

THE COURT: So, when the advisory committee uses the word 'litigation' you do not think that that's what they meant?

MR. WILLIAMS: I think if Mr. Cassino threatens us with litigation in the meeting, as he did, and he's offered a settlement agreement, that's in contemplation of litigation. It's not just litigation. It is in contemplation of litigation, Your Honor. Let me give you an example. Suppose I'm rear ended by somebody. And, I walk into the insurance company, and I say I'm sue you unless you settle with me. And, the insurance company offers me $5,000.00 to settle. That's clearly not admissable. That's exactly the situation that we

have here. There's a policy to promote settlement. Nobody would ever offer to settle any kind of a claim before litigation, if you have to file a lawsuit in order to go through 408. This is just like Mr. Cassino walking into the insurance company in an auto case and saying, I'll settle -- or, I'll sue you unless you pay me, and then the insurance company offering a settlement. There is absolutely no difference. He came into this termination meeting. He said, "I'll see you in Court." He admits that in his deposition. We were offering him a settlement. Now, there are a couple of other grounds for our objection, Your Honor. It isn't just 408. They have to lay a foundation before they can get this in, that somehow this is intended to be an admission, or somehow it proves something. They don't

have any foundation as to who prepared this release, what it was intended to do. The release itself was many pages long. It doesn't just talk about age discrimination. It talks about any claims against the company. It talks about all claims.

THE COURT: But, that's the same as any other --

MR. WILLIAMS: It's a general release.

THE COURT: Well --

MR. WILLIAMS: It's clearly a general release. Now, if the offer -- when is a general release admissable in evidence to prove anything? There are auto cases and negligence cases tried every day where there were offers to compromise made before litigation, and you can't get that in evidence. And,

it's the same thing here, Your Honor; absolutely, no difference, whatsoever.

THE COURT: Mr. McGavin?

MR. McGAVIN: Yes, Your Honor.

THE COURT: Since the rule excludes only when the purpose is to proving the validity or invalidity of the claim or its amount, an offer for another purpose is not within the rule, what's the other purpose?

MR. McGAVIN: Intent. Intent to discriminate. Intent to get Mr. Cassino to sell off his statutory rights to prosecute an age discrimination case.

MR. WILLIAMS: Your Honor, the other purpose that's contemplated by the rule is to show something else, is to show sort of chain of custody or something that doesn't have to do with liability. Intent is the very issue of liability that's being tried here. If

the jury finds we didn't intend to discriminate against Mr. Cassino, we win the case. He's offering it to prove intent. That's liability. That's the essence and the heart of liability, Your Honor.

THE COURT: Is, under A.D.E.A., is intent one of the necessary elements?

MR. WILLIAMS: Yes, sir. They -- we -- they have to prove that we intentionally terminated Mr. Cassino because of his age.

THE COURT: What case says that?

MR. WILLIAMS: That's not true, Your Honor.

THE COURT: What case says that?

MR. WILLIAMS: All the cases.

MR. McGAVIN: We have to prove that age was a factor --

THE COURT: Well, which case, counsel?

MR. WILLIAMS: The Cansellier case in the Ohio Circuit says that, Your Honor.

THE COURT: Pardon?

MR. WILLIAMS: The Cansellier case.

THE COURT: What's -- where is the citation in your brief?

MR. WILLIAMS: We cited the Cansellier case, Your Honor, to be controlling --

THE COURT: What's the citation in that case?

MR. WILLIAMS: Also, Your Honor, the -- the Burdine case in the 9th Circuit says the same thing.

THE COURT: Burdine?

MR. WILLIAMS: Excuse me -- the Supreme -- the United States Supreme Court in the Burdine case says the same thing. Burdine is 450 U.S. --

THE COURT: But, that's not an age discrimination case.

MR. WILLIAMS: Burdine, Your Honor, talks about intent and discrimination. May I read to the Court the 9th Circuit case of Cansellier?

THE COURT: Is that an A.D.A. case?

MR. WILLIAMS: Yes, sir.

THE COURT: Alright. What does it say?

MR. WILLIAMS: If you'll give me just a moment. It says, Your Honor:

". . .that the essence of a proper jury instruction, under Kelly, is that it required the jury to focus on the marginal effect of the age factor. Age may not be the sole factor in the discharge or other discriminatory practice. Conversely, it is not enough that age discrimination be present, or even

to figure into the decision to fire. Age must make a difference between termination and retention of the employee. In the sense that, but for the presence of age discrimination, the jury would not be dis -- the employee would not have been discharged."

Now, that's intent, Your Honor. You have to intend to discharge him because of age.

THE COURT: It doesn't say that.

MR. WILLIAMS: It says that: "It must --" "It is not enough that age discrimination be present or even that it figure in the decision to fire."

THE COURT: I guess the best way to get at it, under the 9th Circuit, under Title VII, if it's a race discrimination case, there must be an intentional act of discrimination. The 9th Circuit says that. Where do they say

that in Kelly or in any of the other age cases?

MR. WILLIAMS: Your Honor, if you'll give me --

THE COURT: What?

MR. WILLIAMS: If you'll give me a moment, I'll find --

THE COURT: Because, if I understand it, A.D.E.A. is not the same as Title VII.

MR. WILLIAMS: The -- as I understand it, Your Honor, there are still some similarities and some differences. They are not completely dissimilar.

THE COURT: Well, it's your brief, counsel. Which case in your brief specifically says that?

MR. WILLIAMS: If I -- could we just have a moment, Your Honor.

THE COURT: Yes.

MR. WILLIAMS: Your Honor, I don't purport that this is a complete answer to your question because I haven't had the time to read all of the cases we've cited in by brief as I'm standing here right now. But, I would cite to the Court to Haddad vs. Lockheed, which is 720 Fed. 2nd 1454, the 9th Circuit, 1983, an age and race discrimination case which says:

"Haddad argues that the District Court improperly instructed the jury that in order for it to find for Haddad, it had to find that Lockheed intended to discriminate." So, the Plaintiff argued that that was a bad instruction. "However, Haddad argued the case on a disparate treatment rather than on a disparate impact theory, and the evidence that he submitted could only have supported the former claim. The District

Court's instruction was proper." There's a case that says intent instruction in an age case is proper. 9th Circuit, 1983. If you'll give me a moment, Your Honor, I think I can come up with some more.

MR. McGAVIN: Your Honor, while counsel is looking, I would like to bring to the Court's attention that good faith is not a defense in an age discrimination action. It has to be a factor that made a difference.

MR. WILLIAMS: Your Honor, let me say this. If intent -- while we're looking at the cases, if intent is not an element, why does he want to prove it? Intent is certainly an element as to liquidated -- as to double-damages. Part of the damages they are seeking are double-damages under A.D.E.A. In order to prove that, they have to prove will-

fulness. Willfulness requires intent. You can't be negligently willful; you have to be intentionally willful. Willfulness is not just doing an act; it's an intent to violate the law. Now, if counsel is willing to stipulate that intent is not necessary, that's something else. But, he's trying to prove intent. That's part of his burden. If he does not prove intent, I win on double damages, and I win the case. He has to prove willfulness. Willfulness is intentional conduct. Intent is clearly an element here.

THE COURT: Well, all the jury has to find, that one of the reasons that he was terminated is his age, that's all.

MR. WILLIAMS: No, sir, not at all. The jury has to find much much more than that. Under the case that I

just read to you, Your Honor, the Cansellier case, the jury has to find that, but for his age he would still have been an employee. And, the jury, uder Cansellier, can find that even if there was age discrimination present, we can still will, unless the Plaintiff proves by a preponderance of the evidence that would still have had -- have had his job were it not for age discrimination. The mere finding of age discrimination, it is very clear, is not sufficient for a Plaintiff's verdict. Cansellier comes right out and says that directly. That's exactly what I just read to Your Honor.

THE COURT: Do you think that any and all agreements in this case are the result of a formal negotiation to settle?

MR. WILLIAMS: I think, Your Honor, to answer your question as directly as I can, yes. Because when Mr. Cassino walked in the door, he had been previously warned that he might lose his job. He was prepared to say I will take you to Court. He was told that he lost his job. He said, I'll sue you. And, he was given, then, his release. Now, that, whether you/-- and he was also told, I might add Your Honor, to go talk about it with his attorney. Nobody asked him to sign the release right there. What was said is, you take this release, you go read it. And, you go talk about it with your attorney, and come back to us. So, at the time when Mr. Cassino said, "I'll see you in Court. I'm not going to take this," he was given a release and asked to go discuss it with his attorney.

THE COURT: I'm going to allow it. I don't think, from what you represent to the Court, it was a formal part of the negotiation to compromise the settlement.

MR. WILLIAMS: Well --

THE COURT: From just what you said.

MR. WILLIAMS: Your Honor, it is a offer of compromise. And, I think that's what you're saying, is that you're ruling it is not an offer of compromise. If it's not an offer of compromise, what in the world was it?

THE COURT: I asked --

MR. WILLIAMS: You just asked, and I said there was a --

THE COURT: I asked you, and you said no.

MR. WILLIAMS: No, I said, yes, Your Honor.

THE COURT: You might have thought you said yes. But, the Court interpreted what you said, no. He hadn't been fired yet, or terminated.

MR. WILLIAMS: Yes, it was in the same meeting.

THE COURT: Well --

MR. WILLIAMS: He was called in, and terminated, and then handed the release.

THE COURT: Well, see, you didn't say that.

MR. WILLIAMS: Well, Your Honor, I'll be happy to make the offer to say it now.

THE COURT: When he said, "I'm going to see attorneys," you said, then you're terminated.

MR. WILLIAMS: No. Your Honor, let me, if I misspoke, let me get it very straight. The testimony is, from

Mr. Cassino, that the meeting lasted about two minutes. He was called into the meeting. He was told that his services were no longer going to be required. He was handed a release, told to talk about it with his attorney. He said, "I'm not going to take this. I'll see you in Court." That was the sequence of events as testified to by Mr. Cassino in a two-minute meeting.

THE COURT: In other words, the whole conversation took place at the time he was terminated.

MR. WILLIAMS: Yes, sir.

THE COURT: I'm going to allow it.

MR. WILLIAMS: May -- may I request, Your Honor, if that is going to be the Court's ruling, that the Court place some conditions on it, to wit:

Number one, that before it comes in or reference can be made to it, a foundation has to be laid that there--that it is probitive of some age discrimination.

And, that it was written by somebody at Reichhold. There is no evidence at all as to who wrote it. The only evidence is, they handed it to him. Before it can be an admission against anyone or probitive of anything, it seems to me there has to be a foundation laid --

THE COURT: I think it goes to the weight of it. Surely he can testify what happened at his termination.

MR. WILLIAMS: I -- Your Honor, he can testify that he was terminated.

THE COURT: Well?

MR. WILLIAMS: And, it seems to me, he can testify that --

THE COURT: You can't separate the two, as far as I can see.

MR. WILLIAMS: Well, again, Your Honor, I go back to my auto -- analogy of the automobile claim. If somebody -- if you're lying on the ground bleeding and somebody offers you a release saying 'I did it,' here I'll compromise a claim for 'x' amount of dollars, is that excludable?

THE COURT: Well --

MR. WILLIAMS: It's an offer of compromise.

THE COURT: That's another case, counsel. At this time, I don't think you can distinguish, because the Court can't, that the simultaneous act of termination and the handing of the document. How do you dis -- you know --

MR. WILLIAMS: Again, I think you have to -- I don't mean to quarrel with you.

THE COURT: At that time there was nothing to negotiate, no compromise to negotiate.

MR. WILLIAMS: I think there was, Your Honor. He was made an offer, a monetary offer. He was offered $18,000.00. which was a half a year's salary, and told to go discuss it with his lawyer.

THE COURT: I think it's so inextricably intertwined with the termination that you can't separate the two.

MR. WILLIAMS: May I suggest the distinction, Your Honor? The distinction I would suggest is between the fact that he was offered the release and the language of the relaese itself. Would the Court consider that? It seems

to me that introducing, -- one of our objections is under 403, Your Honor. That is, that to the extent there is any relevance, the language of the release is highly inflammatory. To the extent that Your Honor has ordered that the fact that he was offered the release was going to come in, it seems to me, is very different from the language of the release.

THE COURT: Well, who drew it?

MR. WILLIAMS: Who drew it?

THE COURT: Yes.

MR. WILLIAMS: There's no foundation for Mr. Cassino as to who drew it.

THE COURT: Well, did he?

MR. WILLIAMS: He certainly did not, Your Honor.

THE COURT: Well?

MR. WILLIAMS: For all I know, it came out of Apprentice Hall, or something.

THE COURT: Well, it came from your client.

MR. WILLIAMS: Yes, sir.

THE COURT: Well?

MR. WILLIAMS: Well, the fact is it did come from my client.

THE COURT: Well?

MR. WILLIAMS: But, that doesn't mean my client drew it. It means they handed it to him.

THE COURT: It will be admitted.

MR. WILLIAMS: Your Honor, I would suggest that -- that we separate out the fact that a settlement offer was made to him from the exact language of the settlement offer. Assuming, for the sake of argument, the settlement offer is probitive of something, which I

dis -- respectfully disagree with, but if the Court is going to rule it is probitive of something, fine.

THE COURT: He can testify to anything that happened to him at the time of termination.

MR. WILLIAMS: Well, alright. So, he can say, then, Your Honor, that he was offered a release. But, why does that mean that the exact language of the release should go in. What is the exact language of the release probitive of? What is that --

THE COURT: Your exception is noted, counsel. Next motion. Next motion.

(2)

No. 87-900

Supreme Court, U.S.
FILED
DEC 30 1987
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CLERK

IN THE

Supreme Court of the United States

REICHHOLD CHEMICALS, INC.,

Petitioner,

v.

GERARD A. CASSINO and SALLY CASSINO,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

REICHHOLD CHEMICALS, INC.,

Petitioner,

v.

GERARD A. CASSINO and SALLY CASSINO,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondents agree with Petitioner's recitation of OPINIONS BELOW, JURISDICTION OF THIS COURT, FEDERAL JURISDICTION, and that the Age Discrimination and Employment Act, 29 USC Sec. 621 et. seq. is the relevant statute. Respondents disagree that 29 CFR Sec. 1627.16[1] is pertinent because its effective date was September 28, 1987[2], nearly four and one-half years after Cassino was terminated, and more than two years after his trial.

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[1] See Petitioner's Appendix F

[2] Id., at 62(a).

STATEMENT OF THE CASE

A. Material Facts

Respondent Gerard Cassino ("Cassino"), was one of sixteen Reichhold employees laid off at the Tacoma, Washington plant during company reorganization on June 23, 1983. None of the people who were terminated had advance notice that they were going to be terminated. All of the terminated employees, including Cassino, were proffered settlement agreements and general releases.[3] The unique, particular language of that document is critical to this Petition. In it, Petitioner sought waiver of all "... rights under federal, state, or local laws prohibiting age or other forms of discrimination..."[4] Cassino refused this termination agreement, exhausted his administrative remedies, and sued Petitioner under, inter alia, the ADEA.

B. Trial Court Rulings

Respondents substantially agree with Petitioner's statement of Trial Court Rulings, except with regard to the argumentative statements about hostility and front pay.

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[3] See Petitioner's Appendix G.

[4] Id. at 1296(a).

C. Court of Appeals Decision

Respondent agrees with Petitioner's statement of the Court of Appeals decision.

THIS WRIT SHOULD BE DENIED

This Court should deny the Writ of Certiorari because the decision below is sound and does not conflict with existing statutory, regulatory or case law precedent.

I. Evidence of the termination under the unique facts presented here was appropriate and will have no impact on future implementation of the ADEA.

A. Admissibility of the Termination Agreement here is consistent with the ADEA, EEOC regulations, and all circuit courts.

Petitioner seeks protection afforded by case law interpreting settlement agreements which have been "knowingly and voluntarily entered into". Such an attempt by Petitioner is misguided and inappropriate. Here, there was a knowing and voluntary immediate rejection of a proper termination agreement. If Cassino had signed that document, Petitioner would have prevailed on Summary Judgment prior to trial. See, e.g., Lancaster v. Buerkle Buick-Honda Co., 809 F.2d 539 (8th Cir.) cert. denied, 107 S.Ct. 3212 (1987).

Petitioner, and any future employer who finds itself in the same situation which Reichhold did, can easily avoid the problem presented here. The way to avoid the problem is to denominate that the employee is releasing all claims not only with regard to age discrimination, but with regard to sex, race, national origin, religion, handicap, etc. If that language had been in the release proffered to Cassino, the smoking gun component of that termination agreement would not have been present and this Petition for Certiorari would not be sought on this issue. Petitioner had a sloppy settlement agreement and general release on this one issue, and has been made to pay for it. In Lancaster, supra, at 540, the 8th Circuit recited how Plaintiff had sought to show that a settlement agreement was not clear enough because it did not "... mention expressly any release of claims under the ADEA. Moore v. McGraw Edison Co., 804 F.2d 1026, 1033 (8th Cir. 1986) does not require the termination agreement specifically to mention the ADEA. See also Runyan v. National Cash Register Corp., 787 F.2d 1039, 1044 n. 10 (6th Cir. 1986) (en banc), cert. denied, 107 S.Ct. 178 (1987)". In the cited language from Runyan, supra, at 1044 n. 10, the 6th Circuit stated:

We reject Plaintiff's argument that the waiver does not apply to ADEA claims because it did not specifically refer to the ADEA.

Petitioner's attempt to manufacture a "conflict" on this point should not be well received by this Court.

Petitioner next cites a "conflict" with EEOC regulations. The regulation they refer to is 29 CFR Sec. 1627.16. As mentioned above, that has an effective date of September 28, 1987. That is more than four years after termination, more than two years after trial, and after the 9th Circuit issued its decision and denied a Petition for Rehearing en banc. Petitioner uses this new regulation for authority that age must be specifically mentioned in a release in order to give the release the full force and effect of law. This regulation changes that which has been held in case law as mentioned above. The regulation is not profound. Any time there is an actual dispute, controversy, administrative charge, or lawsuit, with regard to a claim of age discrimination, it would only make sense for the releasing party to mention that it was settling an age discrimination claim. Nothing profound there. Furthermore, administrative regulations do not have retroactive effect by force of law. Nor does the express wording

of the regulation in question provide for its retroactive application.

Denial of the Writ of Certiorari will strengthen the policies behind the ADEA, not undermine them. Where Petitioner reflects age consciousness, Respondents should be afforded wide latitude to establish discrimination since it is never admitted, and must be inferred from the deeds, words and actions of employers.

B. Admitting Evidence of a Proper Termination Agreement is Not Inconsistent with Federal Rules of Evidence 403 and 408, but Is Consistent with Rules 401 and 402.

The key rule here is FRE 408. That rule provides in pertinent part:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to their validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. (Emphasis added).

Petitioner misleads the Court in suggesting that there was a dispute at the time the termination agreement was proffered so that it should be precluded under Rule 408. Unlike the analogies Petitioner suggests, the situation here is more like one person

hitting another person with a club which has a release attached to the club. Clearly, that situation, and the situation at hand, are not contemplated as claims which are "...disputed as to their validity or amount..." Here, the parties talked settlement after charges and the suit were filed, Cassino did not offer such evidence because it was clearly inadmissible under 408 because there was a dispute existing.

This was a termination agreement, not a settlement agreement because there was no dispute, despite its title as a "settlement agreement and general release." The document was proffered to Cassino only to avoid a controversy if Petitioner felt it was discriminating on the basis of age. The document speaks for itself with the trier of fact able to read its clear and unambiguous language and to draw whatever inferences it wants from the written word.

Petitioner seeks alternative preclusion of the termination agreement under FRE 403. That rule provides that "although relevant, evidence may be excluded if its probative value is substantially outweighed by "the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time,

or needless presentation of cumulative evidence." There clearly was prejudice to Respondent by admitting the termination agreement. It was the same sort of prejudice a criminal defendant receives when an eyewitness testifies against him. The prejudice here was not the type sought to be precluded by FRE 403, because considerations under FRE 401 and 402 made this relevant evidence admissible as "... having any tendency to make the existence of any fact that is of consequence to the termination of the action more probable or less probable than it would be without the evidence." This evidence was helpful in establishing the age consciousness and mentality of Respondent, and was properly admitted.

II. Front Pay is Appropriate when there is Hostility and No Position Open for Respondent

Petitioner cites hostility created during litigation as an inadequate basis for award of front pay. That is a misinterpretation of the 9th Circuit opinion, and misleading to this Court. The precise language from the 9th Circuit opinion in Cassino v. Reichhold Chemicals, Inc., 817 F.2d 1338, 1346-47 (9th Cir. 1987), is as follows:

The ADEA provides that '[i]n any

> jurisdiction to grant such legal or equitable relief as may be appropriate ... including without limitation judgments compelling employment, reinstatement or promotion ...' 29 U.S.C. Sec. 626(b). In discriminatory discharge cases, the decision whether to order reinstatement is within the discretion of the trial court. Cancellier, 672 F.2d at 1319. Although reinstatement is the preferred remedy in these cases, it may not be feasible where the relationship is hostile or no position is available due to a reduction in force. Thorne, 802 F.2d at 1137; Fadhl v. City and County of San Francisco, 741 F.2d 1163, 1167 (9th Cir. 1984); Cancellier, 672 F.2d at 1319. Under such circumstances, an award of future damages or 'front pay' in lieu of reinstatement furthers the re,medial goals of the ADEA by returning the aggrieved party to the economic situation he would have enjoyed but for the defendant's illegal conduct. See Prudential Federal, 763 F.2d at 1173; Cancellier, 672 F.2d at 1319. Thus, front pay is an award of future lost earnings to make a victim of discrimination whole. Maxfield v. Sinclair Int'l, 766 F.2d 788, 795-96 (3d Cir. 1985), cert. denied, __U.S.__ 106 S.Ct. 796, 88 L.Ed.2d 773 (1986); Whittlesey v. Union Carbide Corp., 742 F.2d 724, 727-28 (2d Cir. 1984).

The defense at trial was that, due to a reduction in force and reorganization, there were no positions for Cassino with Petitioner. The Court in allowing the jury to consider front pay, and the jury in awarding front pay, rejected attempts by Petitioner to both have its cake and eat it too.

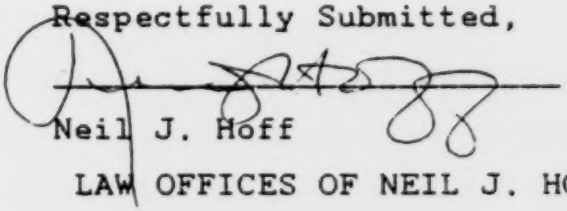
Hostility is not the only basis for the award of front pay. The Court was cognizant of the reduction in force which Petitioner presented evidence about. Front pay was properly introduced to make Cassino whole, and to deter Petitioner.

CONCLUSION

The 9th Circuit opinion will have minimum precedential value with regard to the termination agreement which was admitted into evidence. Since there was no dispute at the time, that document was not precluded by federal statutory, regulatory, or case law, including FRE 401, 402, 403 and 408. Front pay was properly awarded in this case to make Cassino whole.

The Petition for Writ of Certiorari in this case should be denied.

Respectfully Submitted,



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No. 87-900

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

REICHHOLD CHEMICALS, INC.,
Petitioner,

v.

GERARD A. CASSINO and SALLY CASSINO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-900

REICHHOLD CHEMICALS, INC.,
Petitioner,

v.

GERARD A. CASSINO and SALLY CASSINO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42 of the Rules of this Court, the Equal Employment Advisory Council (EEAC) respectfully moves this Court for leave to file a brief as amicus curiae in support of the petitioner, Reichhold Chemicals, in this case. The brief is conditionally filed herewith in accordance with Rule 36.1. In support of this motion, EEAC shows as follows:

1. EEAC is a voluntary nonprofit association organized to promote sound approaches to the elimination of discriminatory employment practices. Its membership consists of a broad segment of the employer community in the United States, including individual employers as

well as several trade associations which themselves have hundreds of corporate members. EEAC is governed by a Board of Directors composed of experts and specialists in the legal and practical aspects of equal employment policy. The members of EEAC are firmly committed to the principles of nondiscrimination and equal opportunity in employment.

2. Substantially all of the Council's members, and the constituents of its trade association members, are employers subject to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, as well as other equal employment statutes and regulations. As employers, many of EEAC's members maintain severance pay programs providing funds to terminated employees. Also, as potential respondents to ADEA charges, they are interested in encouraging the voluntary settlement of such claims.

3. EEAC's members thus are directly interested in the issue presented on appeal in this case—that is, whether an unexecuted release of claims requested in exchange for exceptional severance pay is admissible to prove liability and particularly to show a willful violation of the ADEA.

4. The issues presented in the petition for certiorari are extremely important to the nationwide constituency which EEAC represents. The lower court's holding frustrates the policy of encouraging settlements without litigation and often may force terminated employees to file unnecessary or unwarranted ADEA claims in order to obtain a valid release prior to granting severance pay. Indeed, the rationale of the Ninth Circuit is not limited to age discrimination charges and could undercut the voluntary resolution of claims under other civil rights statutes, such as Title VII, the Equal Pay Act, or wrongful discharge claims. Moreover, the holding conflicts with

this Court's decision in *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985) that a "willful" violation of the ADEA can be proven only by showing knowledge or reckless disregard of the ADEA, and adopts a minimal standard previously rejected by this court.

5. EEAC's members also are concerned about the implications of the decision below for the future of bona fide severance pay programs. If a request for a release is admissible as proof of liability, employers facing this new and uncertain liability are likely to have strong second thoughts about offering exceptional severance payments without the protection of a release. Thus the lower court's decision could have a chilling effect on bona fide augmented severance pay programs designed to provide all employees with increased economic security during the often difficult transition to new employment.

6. Because of its interest in the application of the nation's civil rights laws, EEAC has filed over 220 briefs as amicus curiae in cases before the United States Supreme Court, the United States Circuit Courts of Appeals and various state supreme courts. A number of the cases in which EEAC has participated have involved the proper interpretation of the ADEA. *See, e.g., Trans World Airlines, supra*; *Lorillard v. Pons*, 434 U.S. 575 (1978); *Shell Oil Co. v. Dartt*, 434 U.S. 99 (1977); *Burns v. Equitable Life Assurance Society of the United States*, 696 F.2d 21 (2d Cir. 1982), *cert. denied*, 464 U.S. 933 (1983). EEAC also has participated in several cases involving the validity of releases of ADEA claims. *See, e.g., Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539 (8th Cir. 1987), *cert. denied*, 107 S. Ct. 3212 (1987); *Rynyan v. National Cash Register Corp.*, 787 F.2d 1039 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 178 (1986).

7. EEAC has sought and received permissions from this Court to file briefs in other cases concerning non-

discrimination in employment. See, *e.g.*, *State of Florida v. Long*, No. 86-1685, *cert. granted*, 56 U.S.L.W. 3206 (1987); *Marino v. Ortiz*, No. 86-1415 (*decision pending*); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978); and *Shell Oil Co., supra.*

8. The written consent of counsel for the petitioner, Reichhold Chemicals, has been filed with the Clerk of the Court. This motion is being filed under separate cover because counsel for Respondent initially indicated that he would give written consent to the filing of EEAC's brief; however, that consent was withdrawn on the same day EEAC's bound brief was received from the printer and was to be filed with this Court.

WHEREFORE, the Equal Employment Advisory Council respectfully moves that it be granted leave to file the accompanying brief amicus curiae.

Respectfully submitted,

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December 8, 1987

(4)

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONER

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONER

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief as amicus curiae in support of the petition for a writ of certiorari in this case filed by Reichhold Chemicals, Inc. ~~Statements of consent have been submitted to the Clerk of the Court.~~

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote sound approaches to the elimination of discriminatory employment practices. Its membership consists of a broad segment of the employer community in the United States, including individual employers as well as several trade associations which themselves have hundreds of corporate members. The members of EEAC are firmly committed to the principles of nondiscrimination and equal opportunity in employment.

Substantially all of the Council's members, and the constituents of its trade association members, are employers subject to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, as well as other equal employment statutes and regulations. As employers, many of EEAC's members maintain severance pay programs providing funds to terminated employees. Also, as potential respondents to civil rights charges and other employment-related claims, they are interested in encouraging the voluntary resolution of such claims.

The issues presented in the petition for certiorari are extremely important to the nationwide constituency which EEAC represents. The Ninth Circuit held that an unexecuted release of claims requested in exchange for severance pay is admissible to prove liability and to prove a willful violation of the ADEA. The lower court's holding frustrates the policy of encouraging settlements without litigation and undercuts the voluntary resolution of charges under the ADEA and other civil rights statutes, such as Title VII, Equal Pay Act, or wrongful discharge claims. Moreover, the holding conflicts with this Court's decision in *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985), that a "willful" violation of the ADEA can be proven only by showing knowledge or reckless disregard of the ADEA, and adopts a minimal standard previously rejected by this court.

The lower court's decision could also have a chilling effect on bona fide severance pay programs designed to provide employees with increased economic security during the often difficult transition to new employment.

Because of its interest in the application of the nation's civil rights laws, EEAC has filed over 220 briefs as amicus curiae in cases before the United States Supreme Court, the United States Circuit Courts of Appeals and various state supreme courts. A number of the cases in

which EEAC has participated have involved the proper interpretation of the ADEA. *See, e.g., Trans World Airlines, supra; Lorillard v. Pons*, 434 U.S. 575 (1978); *Shell Oil Co. v. Dartt*, 434 U.S. 99 (1977); *Burns v. Equitable Life Assurance Society of the United States*, 696 F.2d 21 (2d Cir. 1982), *cert. denied*, 464 U.S. 933 (1983). EEAC also has participated in several cases involving the validity of releases of ADEA claims. *See, e.g., Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539 (8th Cir. 1987), *cert. denied*, 107 S. Ct. 3212 (1987); *Runyan v. National Cash Register Corp.*, 787 F.2d 1039 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 178 (1986).[1]

STATEMENT OF THE CASE

In mid-1982, Reichhold Chemicals, Inc. ("Reichhold") began a corporate reorganization which resulted in the sale or closure of several Reichhold facilities and a substantial reduction in force. Prior to the reorganization, Gerard Cassino was responsible for assisting in the negotiation and administration of collective bargaining agreements at several Reichhold facilities in the western United States. Most of these facilities were closed, sold or transferred as part of the reorganization, virtually eliminating Cassino's duties.

Cassino was advised in December 1982 to begin looking for another job. His position was terminated in June 1983. Cassino received formal notice of his termination at a meeting with Reichhold officials. At this meeting, Cassino was offered a separation payment of $18,000 cal-

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[1] EEAC has sought and received permission from this Court to file briefs in other cases concerning non-discrimination in employment. *See, e.g., State of Florida v. Long*, No. 86-1685, *cert. granted*, 56 U.S.L.W. 3206 (1987); *Marino v. Ortiz*, No. 86-1415 (*decision pending*); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978); and *Shell Oil Co., supra.*

culated according to his age, salary and length of service. In return, Reichhold asked Cassino to sign a "Settlement Agreement and General Release" waiving claims arising out of his employment. Cassino refused.

Cassino, who was then 52 years old, sued Reichhold under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* Over Reichhold's objection, the trial court admitted the unsigned "Settlement Agreement and General Release" into the record as evidence relevant to the substance of the underlying claim of age discrimination. The jury awarded Cassino $81,000 in back pay, $150,000 in front pay, $246,000 in liquidated damages, and $15,000 on state law claims.

The Ninth Circuit found no abuse of discretion in the admission of the unsigned agreement into evidence, rejecting Reichhold's argument that the release was an inadmissible offer of compromise under Fed. R. Evid. 408. The court concluded that while offers of settlement made after termination are inadmissible to prove liability, offers made contemporaneously are "probative on the issue of discrimination." *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1342 (9th Cir. 1987) (*petition for cert. filed*, No. 87-900).

The court then affirmed the jury's award of liquidated damages, citing to the unsigned release as part of the "substantial evidence" supporting the jury's finding of a "willful" violation of the ADEA. 817 F.2d at 1348.

SUMMARY OF REASONS FOR GRANTING THE WRIT

Review by this Court is necessary because the opinion below conflicts directly with well-established policy encouraging the settlement of claims without litigation. *See, e.g. United States v. Contra Costa County Water District*, 678 F.2d 90 (9th Cir. 1982). Instead of excluding the proposed "Release and Settlement Agreement" from evidence, as required by Fed. R. Evid. 408, the Ninth Cir-

cuit admitted it as evidence of liability and of a willful violation of the ADEA. The lower court's position is likewise contrary to the position taken by the Equal Employment Opportunity Commission, which has endorsed the use of releases of ADEA claims.

Review by this Court also is necessary because the Ninth Circuit has sanctioned an abrupt departure from the usual course of judicial proceedings. By accepting the unsigned release as evidence of a willful ADEA violation, the lower court in essence has revived the minimal "in the picture" standard expressly rejected by this Court in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). The Ninth Circuit's decision thus conflicts directly with this Court's holding in *Trans World Airlines* that proof of a "willful" ADEA violation requires a showing that "'. . . the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.'" 469 U.S. 111, 128 (1985) (quoting *Air Line Pilots Association, International v. Trans World Airlines, Inc.*, 713 F.2d 940, 956 (2d Cir. 1983)). A request for a release is not an admission of liability; it merely shows that the employer was protecting itself from a suit on those grounds. Accordingly, the court below has significantly lowered this Court's standard of proof necessary to show a willful violation of the ADEA.

Further, the Ninth Circuit's decision is likely to have a chilling effect on employer severance pay programs, particularly those arising from reductions in force. The lower court's holding can be applied not only to ADEA claims, but also to Title VII, wrongful discharge, and other causes of action arising out of employment relationships. If an unsigned release is admissible to prove liability, then employers will have to consider not asking employees to release potential claims. As a result, however, employers will be much less willing to offer gratuitous severance payments without any security against suits by former employees who have received the benefit

without having incurred any countervailing obligation. Thus, employees who have no dispute with the employer and who would be more than willing to execute releases will nevertheless be denied the opportunity to receive severance payments to ease the transition to new employment.

REASONS FOR GRANTING THE WRIT

REVIEW BY THIS COURT IS NECESSARY BECAUSE THE NINTH CIRCUIT'S DECISION CONTRAVENES THE POLICY OF ENCOURAGING SETTLEMENT OF CLAIMS, CONFLICTS DIRECTLY WITH AN APPLICABLE DECISION OF THIS COURT AND WILL HAVE A CHILLING EFFECT ON BONA FIDE SEVERANCE PAY PROGRAMS.

I. THE NINTH CIRCUIT'S RULING ALLOWING THE ADMISSION OF AN UNSIGNED SETTLEMENT AGREEMENT TO PROVE LIABILITY CONFLICTS WITH THE SOUND PUBLIC POLICY ENCOURAGING SETTLEMENT OF CLAIMS REFLECTED IN EVIDENCE RULE 408.

A. Public Policy Supports Compromise of Claims.

The decision below disregards sound public policy encouraging the compromise of claims without litigation. Amicable settlements reduce unnecessary costs for all parties and avoid overcrowding of judicial calendars and delays in disposition of cases. In furtherance of this policy, a number of procedures and safeguards have been created to encourage and facilitate the settlement of claims. For example, both Title VII of the Civil Rights Act of 1964 and the ADEA provide for informal resolution through conciliation, conference and persuasion. 42 U.S.C. § 2000e-5(b); 29 U.S.C. § 626(d).

Many employers, when implementing reductions in force, offer terminated employees "severance pay" to ease the transition to new employment. In exchange, employers often ask for written waivers of all potential legal claims against them. Such a waiver usually includes a

release of claims of discriminatory conduct during the employment relationship. *See generally* R. Silberman and C. Bolick, *The EEOC's Proposed Rule on Releases of Claims under the ADEA*, 37 Lab.L.J. 195, 195-6 (1986) (discussion of releases in the context of employment discrimination). Releases of this type have been enforced repeatedly as consistent with public policy and the purposes of both Title VII and the ADEA. *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 52 (1974) (authorizing voluntary waiver of Title VII claims); *Pilon v. University of Minnesota*, 710 F.2d 466 (8th Cir. 1983) (Title VII age and sex discrimination claims waived by general release); *Runyan v. National Cash Register Corp.*, 787 F.2d 1039 (6th Cir.), *cert. denied*, 107 S. Ct. 178 (1986) (unsupervised release of ADEA claim valid); *Sullivan v. Boron Oil Company*, —— F.2d ——, No. 202 Daily Labor Report (BNA), October 21, 1987 at D-1 (3rd Cir. September 30, 1987) (general release barred ADEA claims).

Further, the EEOC endorses knowing and voluntary releases of ADEA claims made in exchange for valuable consideration. Agency regulations at 29 C.F.R. § 1627.16 list three safeguards it considers to be indicia of a knowing and voluntary waiver:

> (1) The agreement was in writing, in understandable language, and clearly waived the employee's rights under the ADEA;
>
> (2) A reasonable period of time was provided for employee deliberation;
>
> (3) The employee was encouraged to consult with an attorney.

Id.[2] These concepts were recapitulated by the Third Circuit in *Sullivan v. Boron Oil Company*, *supra*, holding

[2] The EEOC's list of circumstances indicating a knowing and voluntary waiver are part of the final rule published August 27, 1987 adopting an administrative exemption allowing for the en-

that a general release "from all claims of employment discrimination" barred ADEA claims. *Sullivan, supra,* at D-2. One reason for asking for a release, of course, is to avoid the very real possibility that employees who receive these enhanced benefits will nevertheless breach their bargain and sue their employer.

The "Settlement Agreement and General Release" offered by Reichhold meets these qualifications. It was written in comprehensible terms and included a specific waiver of age discrimination claims. Reichhold advised Cassino to take the document home and to review it with an attorney. See Petition for Writ of Certiorari, p. 3.

The Ninth Circuit based its holding in part on its observation that settlement agreements offered at the time of termination ". . . may also tend to be coercive rather than conciliatory." 817 F.2d at 1343. However, since Cassino rejected the offer and refused to sign the release, it can hardly be said that he was coerced. The issue of coercion arises only after a claimant has executed a release and seeks to have it set aside on the grounds that it was involuntary. Moreover, neither the need to make a choice quickly nor the difficulty of electing between options necessarily renders a decision involuntary. *Henn v. National Geographic Society,* 819 F.2d 824 (7th Cir. 1987), *cert. denied,* November 30, 1987, No. 87-558.[3]

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forcement of non-EEOC supervised waivers under the ADEA. 52 Fed. Reg. 32,293 (1987) (to be codified at 29 C.F.R. § 1627.16). A pending amendment to H.R. 2763, 100th Cong., 1st Sess., which provides budget authorization for the EEOC and other agencies will, if adopted by Congress, suspend the final rule during fiscal 1988. 133 Cong. Reg. S14,383 (daily ed. October 15, 1987). *But see, e.g., Runyan* and *Lancaster,* which endorsed the EEOC's proposed rule.

[3] Observing that "releases are frequently offered at severance, EEOC Commissioner Silberman has said that ". . . a release should not be voided solely because the releasor was motivated by economic necessities." Silberman, *supra,* at 202.

The public policy encouraging settlement of disputes without litigation is furthered by the offer of severance pay in exchange for a general release of claims at the termination of an employment relationship. Several of the courts of appeals as well as the agency having responsibility for enforcement of Title VII and the ADEA have authorized the use of voluntary releases to resolve claims. The Ninth Circuit's decision to allow such a release to be admitted into evidence as proof of a willful violation of the ADEA frustrates this policy.

B. Evidence Rule 408, Which Precludes the Use of Settlement Offers to Prove Liability, Protects Attempts to Resolve Disputes Amicably.

The public policy favoring amicable resolution of disputes also is furthered by Rule 408 of the Federal Rules of Evidence, which precludes the use of settlement offers to prove liability.[4] *United States v. Contra Costa County Water District*, 678 F.2d 90 (9th Cir. 1982). The Advisory Committee's Note on Rule 408 explains that the rule is based on two grounds: (1) that the evidence is irrelevant because it may reflect an attempt to buy peace rather than an admission of liability, and (2) that ex-

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[4] The rule states:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Fed. R. Evid. 408.

clusion of such evidence promotes the public policy to encourage compromise and settlement. 10 J. Moore & H. Bendix, Moore's Federal Practice, § 408.01 (2d ed. 1987).

Rule 408 covers not only the offer itself, *Burns v. City of Des Peres*, 534 F.2d 103 (8th Cir. 1976), but also documents prepared in furtherance of compromise. *Ramada Development Company v. Rauch*, 644 F.2d 1097 (5th Cir. 1981). Settlement negotiations with third parties are likewise protected. *Branch v. Fidelity & Casualty Co. of New York*, 783 F.2d 1289 (5th Cir. 1986) (settlement with co-defendant inadmissible to show liability); *United States v. Contra Costa County Water District*, 678 F.2d 90 (9th Cir. 1982) (settlement negotiations between plaintiff and third party inadmissible).

The Ninth Circuit sought to avoid Rule 408 by distinguishing between a settlement offer made after an ADEA claim has been articulated and one made at termination before the terminated employee chooses to pursue a claim, saying ". . . the protections of Rule 408 were designed to encourage the compromise and settlement of *existing* disputes." 817 F.2d at 1343 (emphasis supplied).

Thus, the court below distinguished between two typical situations involving releases of ADEA claims by terminated employees in exchange for consideration. The first involves negotiated settlement of an ADEA claim asserted after termination. The second situation, and that which occurred in the instant case, entails a release offered at termination contemporaneously with a severance pay package. 817 F.2d at 1342. In the lower court's view, a settlement offer made after filing an ADEA claim is shielded by Rule 408 while one made at termination is admissible to prove not only liability but also a willful violation.

The Ninth Circuit inexplicably observed that in the second situation, "[s]uch termination agreements are generally made a part of the record in the case and are

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considered relevant to the circumstances surrounding the alleged discriminatory discharge itself. The termination agreements, therefore, are probative on the issue of discrimination." 817 F.2d at 1342. Apparently, the Ninth Circuit bases its departure from accepted procedure on the difference between a settlement agreement offered after an ADEA claim has been asserted, and one offered at the time of termination when no ADEA claim has yet been made.

The court's artificial distinction places an unreasonable burden on employers and employees alike. Under its approach, if an employer wishes to avoid having its offer of severance pay used as evidence of liability on a later claim because it asks for a release in return, it must wait until each of the employees involved in a reduction in force files a lawsuit before it can make the offer. Likewise, terminated employees cannot expect a gratuitous severance payment unless they first file a claim for every conceivable right and remedy arising out of their employment. Thus, the Ninth Circuit's decision actually encourages litigation by forcing employers to require all employees to file unnecessary or spurious claims so that their request for a release in return for severance pay can be characterized as an inadmissible settlement offer instead of an admissible termination agreement.

In addition to being unrealistic, as well as out of touch with the purposes of Rule 408, the authority cited by the Ninth Circuit in fact is directly opposite to the conclusion reached below. For example, the Ninth Circuit opinion at page 1342 cites four cases as authority for its unprecedented position. Those cases conflict with, rather than support the Ninth Circuit's novel approach.

All four cases cited arose under the ADEA and involve releases. In three of those cases the releases were introduced not by the plaintiff to prove discrimination but by the defendant to bar the claim successfully. Thus, in

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Lancaster v. Buerkle Buick Honda Co., 809 F.2d 539 (8th Cir. 1987), *cert. denied*, 107 S.Ct. 3212 (1987), and *Moore v. McGraw Edison Company*, 804 F.2d 1026 (8th Cir. 1986), waivers signed in exchange for severance pay were offered into evidence by the employers and admitted as proof of valid releases which barred the ADEA actions. An alleged oral release was offered by the employer in support of a breach of contract claim in *Pruet Production Co. v. Ayles*, 784 F.2d 1275 (5th Cir. 1986), and the employee raised the ADEA in a counterclaim.

In the fourth case cited by the Ninth Circuit, *Sherrod v. Sears, Roebuck & Co.*, 785 F.2d 1312 (5th Cir. 1986), an employee terminated as part of a reduction in force refused to sign a release in exchange for accrued vacation and severance pay. As in the instant case, the release was a general waiver of claims requested from all employees receiving severance pay. Holding that Sherrod had produced insufficient evidence of age discrimination, the Fifth Circuit observed that Sherrod failed to show a connection between the release and Sears' alleged discriminatory intent. 785 F.2d at 1315.

Also, the court inappropriately relies on EEOC Commissioner R. Gaull Silberman's observation that releases of ADEA claims usually arise after assertion of an ADEA claim or at termination in conjunction with an offer of severance pay. R. Silberman and C. Bolick, *The EEOC's Proposed Rule on Releases of Claims under the ADEA*, 37 Lab.L.J. 195, 195-196 (1986). In explaining the EEOC's position that voluntary waivers of ADEA claims need not be supervised by the EEOC, Commissioner Silberman specifically refused to limit her endorsement to settlements of asserted claims, stating,

> "Limiting releases in this manner would eliminate the use of releases in reduction in force situations, where employers offer consideration in exchange for releases of claims, thereby inhibiting amicable agreements and limiting the options available to older em-

> ployees. Such an arbitrary approach does not serve the objectives of the Act . . . .

Id. at 202. There is no reason to distinguish the two situations. In each, an employee gives up a potential right in return for consideration.

Accordingly, the writ should be granted to review the decision below which is contrary to Rule 408 and other court decisions.

II. THE NINTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S HOLDING IN *TRANS WORLD AIRLINES V. THURSTON* THAT A "WILLFUL" VIOLATION REQUIRES KNOWLEDGE OR RECKLESS DISREGARD OF THE AREA.

This Court has determined that in order to find a "willful" violation of the ADEA and thus award double damages, the employee must show that the employer either knew its conduct violated the ADEA or showed a reckless disregard for the Act's prohibitions. *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985). The Ninth Circuit considered the "General Release and Settlement Agreement" to be part of the "substantial evidence" supporting the jury's finding of a "willful" violation. The Ninth Circuit's analysis conflicts directly with this Court's reasoning in *Trans World Airlines*.

Section 7(b) of the ADEA, regarding enforcement, incorporates by reference certain provisions of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, including § 16(b) which mandates an award of an additional sum equal to the back pay award as "liquidated damages." 29 U.S.C. § 216(b). The ADEA specifically restricts liability for liquidated damages to "cases of willful violations" of the ADEA. 29 U.S.C. § 626(b).

This Court addressed the appropriate construction of "willful violation" in *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985), for purposes of awarding liquidated damages under the ADEA and held that "a viola-

tion is 'willful' if '. . . the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.'" 469 U.S. 111, 128 (1985) (quoting *Air Line Pilots Association, International v. Trans World Airlines, Inc.*, 713 F.2d 940, 956 (2d Cir. 1983)). In so doing, this Court specifically rejected the standard which would find a willful violation if the employer knew the statute was "in the picture." This Court has now granted certiorari in *Brock v. Richland Shoe Company*, 799 F.2d 80 (3rd Cir. 1986) (*cert. granted*, No. 86-1520, October 5, 1987) to determine whether the "in the picture" standard should be used in determining the appropriate statute of limitations under the ADEA.

The court below listed the "Settlement Agreement and General Release" as part of the "substantial evidence" supporting the jury's finding of willful age discrimination simply because "the termination agreement . . . specifically required Cassino to waive his right to sue for age discrimination in return for severance pay." 817 F.2d at 1348. This conclusion is tantamount to use of the "in the picture" standard rejected by this Court in *Trans World Airlines*, because to be enforceable against age suits, any valid release either will expressly refer to age discrimination or will be relied upon later as implicitly including ADEA claims.

This Court realized that the "in the picture" standard "would result in an award of double damages in almost every case," because "[a]s employers are required to post ADEA notices, it would be virtually impossible for an employer to show that he was unaware of the Act and its potential applicability." *Trans World Airlines*, 469 U.S. 111, 128, (1985). Similarly, employers seeking to obtain releases of all potential claims in exchange for consideration as part of a reduction in force commonly include language waiving age-based discrimination claims. *See* R. Silberman and C. Bolick, *The EEOC's Proposed*

Rule on Releases of Claims under the ADEA, 37 Lab. L.J. 195, 195-196 (1986). Under the Ninth Circuit's decision, any release which specifically called for a waiver of claims based on age would be evidence of a "willful" violation of the ADEA. This result makes no legal or logical sense. The fact that an employer tenders a release does not necessarily mean that the employer has committed age discrimination; it merely shows that the employer was protecting itself from the possibility of a suit on those grounds.

The "Settlement Agreement and General Release" which Reichhold presented to Cassino with an offer of consideration does not prove that Reichhold terminated Cassino in violation of the ADEA. On the contrary, it is in keeping with a widely used practice of companies implementing reductions in force. Indeed, the inclusion of a specific waiver of ADEA claims conforms to the EEOC's requirement that waivers be "knowing and voluntary." [5] At best, it shows that Reichhold knew that the ADEA was "in the picture," but not that Reichhold willfully violated the ADEA.

Accordingly, it is clear that review on the writ of certiorari herein is appropriate because of the Ninth Circuit's unsubstantiated and unprecedented sanction of the admission of a settlement offer into evidence as probative of age discrimination and a willful violation of the ADEA in conflict with this court's decision in *Trans World Airlines*.

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[5] One of the factors listed by the EEOC as indicating a "knowing and voluntary" waiver of ADEA claims is that "The agreement . . . clearly waived the employee's rights or claims under the ADEA." 29 C.F.R. § 1627.16(c)(1). Thus, in order to obtain a valid unsupervised waiver of ADEA claims, the employer must include in the release language which clearly waives age discrimination claims. This language in Reichhold's release, however, was found to be evidence of a "willful" violation."

III. THE NINTH CIRCUIT'S DECISION COULD JEOPARDIZE BONA FIDE SEVERANCE PROGRAMS, TO THE DETRIMENT OF EMPLOYEES, EMPLOYERS, AND THE GENERAL PUBLIC POLICY FAVORING SETTLEMENTS.

The Ninth Circuit's decision could have a chilling effect on bona fide severance programs. But there are even broader implications. While the lower court's opinion arose under the ADEA, its holding clearly could be extended to other cases involving employment relationships, such as Title VII, the Equal Pay Act or wrongful discharge claims. Thus, a release offered at termination could be used later to substantiate nearly any claim against the employer.

A genuine severance pay program such as that offered to Cassino by Reichhold provides a gratuitous payment at termination of employment in exchange for a release of claims against the employer. As explained, "This scenario most frequently accompanies reductions in force." Silberman, *supra*, at 196. The usual purpose of severance pay is to ". . . tide an employee over while seeking a new job. . ." *Adcock v. Firestone Tire and Rubber Company*, 822 F.2d 623, 636 (6th Cir. 1987) (unemployment held to be prerequisite for termination pay under terms of plan in question). Unless an employer has willingly obligated itself to a formal severance pay plan, an employee is not entitled to any more at termination than accrued wages and benefits due.

Augmented severance pay plans in large part are related to the employer's discretion. It is entirely reasonable to expect employees who are receiving exceptional payments upon separation, in return, to release any claims against the employer. As here, those dissatisfied with the amount of the settlement offer are free to reject it and seek a larger amount through litigation. The many others, however, who have no disagreement with the employer and are satisfied with the amount of sev-

erance pay may enjoy the increased payment without the uncertainties of a contested lawsuit.

A request for a release and "settlement agreement" is not in and of itself an admission of liability. On the contrary, releases arise from a variety of circumstances. Obviously, a party may attempt to negotiate a compromise when he knows he has violated the law and now seeks to minimize the damage. But a settlement can also spring from the choice of those having opposing viewpoints to agree to disagree and end the controversy. The existence of a release, whether executed or not, also can indicate uncertainty; when neither party is sure of a victory at trial, they may compromise on middle ground. Finally, in some cases, parties having no disagreement reduce an agreement to writing and include a release as protection against breach.

In any of these situations, the usual purpose of a settlement is to avoid the risk of litigation. *See, e.g., United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971). It does not establish that either party was in the right. As noted by the Fifth Circuit in *Florida Trailer and Equipment Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960), regarding judicial approval of settlements:

> Of course, the approval of a proposed settlement does not depend on establishing as a matter of legal certainty that the subject claims or counterclaim is or is not worthless or valuable. The probable outcome in the event of litigation, the relative advantages and disadvantages are, of course, relevant factors for evaluation. But the very uncertainty of outcome in litigation, as well as the avoidance of wasteful litigation and expense, lay behind the Congressional infusion of a power to compromise. This is a recognition of the policy of the law generally to encourage settlements. This could hardly be achieved if the test on hearing for approval meant establishing success or failure to a certainty. Parties would be hesitant to explore the likelihood of settlement apprehensive as they would be that the application for

> approval would necessarily result in a judicial determination that there was no escape from liability or no hope of recovery and hence no basis for a compromise.

284 F.2d at 571. Thus, it is the fact of uncertainty and not the firm assurance that one party has violated the law that often leads to settlements; if both parties are unsure of the probable outcome, they may be able to reach a compromise satisfactory to both. Since doubt as to liability may be the very source of a proposed release and settlement agreement, it is clearly erroneous to use such an agreement as an admission of liability. Indeed, even an employer that is absolutely confident that it has no legal liability to a discharged employee may conclude that it is worthwhile to offer valuable consideration in return for a release of potential claims in order to avoid the probable adverse publicity and inevitable costs of defending against even a meritless claim. For these numerous reasons, it is most improper to use such a tendered release as evidence of *any* violation of the ADEA, much less a willful one.

Employers are well aware that if no release is obtained, the occasional disgruntled employee is likely to sue the employer while at the same time enjoying the enhanced severance benefit. Employers thus probably will not gratuitously offer severance pay without asking for a release in exchange. If an offer with a release is admissible to show liability, it is more likely that no offer will be made at all.

If the Ninth Circuit's decision is allowed to stand, the potential for harm to innocent third parties is great. Employers will strongly consider no longer offering exceptional severance pay based on salary and service to all employees affected by a reduction in force. Both employers and employees will have to engage in a charade of litigation to create a fictitious "existing" claim before the employer may make a valid settlement offer that will not be admissible to prove a substantive violation.

The need for this Court's review is apparent since the Ninth Circuit's holding conflicts with the long standing policy encouraging settlement without litigation and could have a devastating effect on severance pay programs.

CONCLUSION

For the foregoing reasons, the amicus respectfully urges this Court to grant the petition herein and issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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No. 87-900

IN THE

Supreme Court of the United States

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Petitioner,

vs.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF THE CALIFORNIA EMPLOYMENT LAW COUNCIL AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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BRIEF OF THE CALIFORNIA EMPLOYMENT LAW COUNCIL AS AMICUS CURIAE IN SUPPORT OF THE PETITION

BRIEF OF AMICUS*

INTEREST OF AMICUS

The California Employment Law Council ("CELC" or "*amicus*") is a voluntary, nonprofit organization composed of more than 60 employers. CELC's members employ more than 400,000 persons and represent a broad segment of the employer community in California. *Amicus* was formed to promote the common interests of employers and the public in sound procedures and laws pertaining to employment

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* Consent letters from the parties have been filed with the Clerk.

practices. Petitioner Reichhold Chemicals, Inc. is not a member of CELC.[1]

Many members of *amicus* offer settlement agreements, such as the one at issue herein, to their employees upon layoff or termination. Under these agreements, employees are given enhanced severance benefits in exchange for the release of any potential claims arising from their employment or termination, including discrimination claims. *Amicus* is concerned about the detriment to both employers and employees of permitting such agreements to be introduced as evidence of intentional age discrimination. Under such a rule of law, no one will benefit. Employers will be discouraged from offering valuable benefits; employees will be deprived of the freedom voluntarily to release claims in order to obtain such benefits; and the public and courts will be burdened with additional litigation. Accordingly, *amicus* files this brief urging reversal of the court of appeals.

REASONS FOR GRANTING THE WRIT

This case involves much more than a mere evidentiary question. The Ninth Circuit's decision, affirming District Judge Jack Tanner, will have profound practical significance for employers and employees alike. Many employers follow the salutary practice of offering valuable severance packages to laid-off or terminated employees in exchange for releases of legal claims. Under the Ninth Circuit's rule, such offers can be used as substantive

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[1] Counsel for *amicus* represents petitioner Reichhold in some matters, and indeed represented Reichhold at an earlier stage of this lawsuit. Paul, Hastings, Janofsky & Walker no longer represents petitioner in this suit, and *amicus'* interest in this case is because of the question presented, not the identity of any party.

evidence of willful discrimination. If the Ninth Circuit's view is correct, employers will be deterred from making such offers. Thus, what is at issue here is the survival of a practice — beneficial to employers, employees, courts and the public — designed to obviate employment litigation.

I

STATEMENT OF THE CASE AND SUMMARY OF POSITION

A. Statement of the Case.

The key facts are simple. Reichhold Chemicals offered Gerard Cassino substantial severance benefits, to which he was not contractually entitled, in exchange for a release of legal claims. Cassino rejected the offer, which was his privilege. At trial, the offer and proposed settlement agreement were introduced over Reichhold's objection. *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1341-42 (9th Cir. 1987).[2] The Ninth Circuit, affirming in relevant part, held that the unexecuted settlement agreement was (1) probative of discrimination; (2) not rendered inadmissible, as an offer of settlement, by Federal Rule of Evidence 408;[3] and (3) evidence of Reichhold's *willful* violation of the Age Discrimination in Employment Act (ADEA), because Reichhold's proposed agreement contained language specifically releasing age discrimination rights.

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[2] Reichhold objected on the grounds that Federal Rule of Evidence 408 barred the settlement agreement's admission and, alternatively, that its probative value, if any, was outweighed by its prejudicial effect under Rule 403.

[3] The Ninth Circuit did not address the applicability of Rule 403.

B. Summary of Position.

There is no legal precedent or logical basis for the Ninth Circuit's holding.[4] Employees of course are privileged to reject settlement offers and sue their employers. The critical issue is whether, merely because an employer *proposes* such an arrangement contemporaneous with an employee's termination, that offer should be treated as an admissible concession of guilt. The Ninth Circuit's resolution of that issue threatens the vitality of a common, practical and desirable employment practice. *Amicus* therefore urges the Court to grant the petition and reverse the court of appeals.

II

REVIEW IS NECESSARY TO PRESERVE A SALUTARY EMPLOYMENT PRACTICE DESIGNED TO OBVIATE EMPLOYMENT LITIGATION

A. The Provision of Enhanced Severance Benefits for the Release of Legal Claims is a Practical and Desirable Employment Practice.

It is common practice for companies to offer terminating employees severance benefits in addition to those the companies are obligated to provide by contract or company policy. The standard procedure in offering special severance packages is for the company to obtain a written release of claims in exchange for the extra benefits. This arrangement

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[4] No published opinion prior to the Ninth Circuit's here has allowed into evidence a settlement agreement to demonstrate an employer's intent to discriminate.

mutually benefits employers and employees, and advances the public policy favoring the voluntary resolution of employment disputes.

1. Settlement agreements benefit employers.

The practice of negotiating releases of employment claims is important for employers for two reasons. First, a sluggish economy and foreign competition have forced companies to undertake efficiency-enhancing and cost-cutting measures. Business reorganizations are common; reductions-in-force, leading to terminations and layoffs, unfortunately are sometimes unavoidable. Second, there has been an explosion of employment litigation in the past decade.[5] Some claims are meritorious; some are not. Either way, the costs of defense alone can be staggering. A company's attorneys' fees easily can run into the mid-six figures in a single case.[6] Thus, even if employers "win," they lose.

Employers legitimately wish to protect themselves from litigation costs and risks. Settlement agreements and releases provide such protection. Assured that litigation

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[5] For example, EEOC data reveal that there has been a dramatic increase in the number of age discrimination claims filed in the last several years. In fiscal year 1986, nearly two and one-half times as many charges (26,549) were filed with the EEOC and state fair employment practice agencies as in fiscal year 1980 (11,076). Bureau of National Affairs, *Older Americans in the Work Force: Challenges and Solutions*, 123-24 (1987).

[6] Win or lose, companies have been required to spend from $50,000 to $250,000 to defend employment cases. *E.g.*, Copeland, *The Revenge Of The Fired*, Newsweek, Feb. 16, 1987, at 46-47. Even litigation which is resolved "expeditiously" on summary judgment can cost an employer $30,000 to $50,000 or more in attorneys' fees.

will be avoided, an employer is able to redirect money from its lawyers to its former employees. The money eases the financial impact of separation from a company and assists employees searching for new jobs.

2. Settlement agreements benefit employees.

By offering terminating employees the option of obtaining enhanced severance packages in exchange for a release of claims, companies maximize their employees' freedom of choice. Most terminating employees never have or assert claims arising from their employment. For these employees, the only effect of being offered a severance package is positive: they have an option to receive valuable benefits to which they otherwise would not be entitled. *Henn v. National Geographic Society*, 819 F.2d 824, 826 (7th Cir. 1987) (employee is better off with the severance offer, because he has an extra option).

Even for employees bent on litigation, there is no disadvantage in being offered a termination package. Settlement offers do not compel settlement; they simply give the employee a choice. If an employee does not believe the proposal is adequate, he or she can reject it, as did Cassino in this case.

The Ninth Circuit's real concern apparently is that employers will use "coercive" tactics or otherwise engage in "overreaching." 817 F.2d at 1343.[7] These concerns,

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[7] The EEOC's recent experience is to the contrary; it indicates that most individuals apparently are satisfied with the settlement benefits they receive from their former employers. In one study, only 8% of those who signed settlement agreements releasing ADEA claims later had any desire to challenge them. Silverman & Bolick, *The EEOC's Proposed Rule on Releases of Claims Under the ADEA*, 37 Lab. L. J. 195, 200 (1986).

however, are applicable to the enforceability of releases that are *signed*, not to the admissibility of offers that are *rejected*.[8]

3. Settlement agreements are in the public interest.

Two overriding public policy goals underlie the ADEA. One is to encourage consensual resolution of employment disputes. Settlement of discrimination claims unquestionably is the preferred method of resolving them. *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981) (Congress expressed a "strong preference for encouraging voluntary settlement of employment discrimination claims"); 42 U.S.C. § 2000e-5(b) (1981) ("informal . . . conference, conciliation, and persuasion" of discrimination

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[8] A settlement offer is of no effect, and will not impair an employee's legal rights in any way, unless it is (1) accepted, and (2) enforceable. The present case by definition involves an offer that was rejected. The offer never became binding and could not possibly prejudice Cassino. Even if the offer had been nominally accepted it would not have been binding unless the acceptance was knowing and voluntary. *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974) (Title VII rights may be waived if release is "knowing and voluntary"). Under the EEOC regulations, a waiver of ADEA rights will be deemed knowing and voluntary if:

> [i] The agreement was in writing, in understandable language, and clearly waived the employee's rights or claims under the ADEA;
>
> [ii] A reasonable period of time was provided for employee deliberation; [and]
>
> [iii] The employee was encouraged to consult with an attorney.

52 Fed. Reg. 32,293, 32,294 (Aug. 27, 1987), *to be codified at* 29 C.F.R. § 1627.16(c)(2). The release offered in this case met these criteria.

claims is required before resort to litigation is permitted); 29 U.S.C. § 626(d) (1985) (same).[9]

A second principal objective of the ADEA is to ensure the expeditious resolution of age claims. Older workers by definition have less time remaining in which to pursue careers. *E.g., Burns v. Equitable Life Assurance Society*, 696 F.2d 21, 24 n.2 (2d Cir. 1982), *cert. denied*, 464 U.S. 933 (1983). Prompt resolution of potential claims is in employees' interest.

Settlement agreements such as the one offered Cassino plainly further both of these public policy goals. Such agreements effect prompt and informed resolution of employment disputes and further the mutual interests of employees and employers by providing additional compensation immediately to employees who freely choose to release claims they might have.

The EEOC endorses this salutary employment practice; it does so precisely because it fosters the amicable and expeditious resolution of age and other discrimination disputes, without agency supervision. After two years of rulemaking, the EEOC recently promulgated a regulation endorsing the practice of enhancing severance benefits in consideration for the waiver of ADEA claims. *EEOC: Legislative Regulation and Administrative Exemption Allowing For Non-EEOC Supervised Waivers Under the*

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[9] The preference for informal conciliation was emphasized repeatedly by sponsors of the ADEA. *See, e.g., Age Discrimination in Employment: Hearings on S. 830 and S. 786 Before the Subcomm. on Labor of the Senate Comm. on Public Welfare*, 90th Cong., 1st Sess. 89 (1977), ("the best relationship is voluntary") (remarks of Sen. Yarborough); 123 Cong. Rec. S. 17275 (Daily ed. Oct. 19, 1977) (the ADEA should allow the employee to "resolve the dispute himself or work out a compromise with an employer") (statement of Sen. Williams).

ADEA, 52 Fed. Reg. 32,293, 32,294 (Aug. 27, 1987) (hereinafter *ADEA Waivers*), *to be codified at* 29 C.F.R. § 1627.16. *See* note 8 *supra*. As a result, the EEOC is able to allocate its limited resources to assisting those individuals who truly want to litigate discrimination charges.[10] Accordingly, settlement agreements, such as the one offered Cassino, strike an intelligent and positive balance between an employer's legitimate business interests, an employee's freedom of choice, and the public's interest in the effective enforcement of the employment discrimination laws.

B. The Ninth Circuit's Decision Impedes the Voluntary Settlement of Employment Claims and Leads to Absurd Results.

The Ninth Circuit was simply wrong in concluding that requesting a legal release in exchange for special severance is probative of age discrimination. And, even if the court were correct on that point, its decision still is bad law and bad policy. If an employer's severance-package offer later can be used as affirmative evidence of discrimination, employers will be deterred from making such offers.

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[10] Under the regulation, which embodies Title VII and ADEA case law, settlement agreements do not preclude the EEOC from assessing an agreement's validity or verifying that it preserves an employee's *prospective* rights or claims and is supported by adequate consideration. Moreover, such settlement agreements cannot limit the EEOC's rights and responsibilities to enforce federal employment discrimination laws, nor interfere with the right of an employee to file a charge or participate in an EEOC investigation. *ADEA Waivers* at 32,294.

1. Settlement offers are not probative of discriminatory intent.

The Ninth Circuit held that settlement agreements such as that offered to Cassino constitute "probative [evidence] on the issue of discrimination." 817 F.2d at 1342. The Ninth Circuit's conclusion is legally unprecedented.[11] It also is logically flawed. If offering a release demonstrates an intention to discriminate, then fastening one's automobile seat belt demonstrates an intention to cause an accident. Releases, like seat belts, are a form of insurance. By obtaining a release in consideration for valuable severance benefits, an employer can avoid spending time and money in the defense of employment litigation. The Ninth Circuit's error was its failure to understand that releases buy peace, and that employers are willing to pay money for peace even

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[11] None of the cases cited by the Ninth Circuit support its conclusion that settlement agreements offered at termination are admissible to prove discriminatory intent. In *Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539 (8th Cir. 1987), and *Moore v. McGraw Edison Co.*, 804 F.2d 1026 (8th Cir. 1986), the Eighth Circuit upheld the validity and enforceability of release agreements proffered to employees at termination and prior to the assertion of age discrimination claims. The termination agreements in those cases appear in the record not because they were probative of discrimination, but simply because they constituted the successful affirmative defense to the respective plaintiffs' age discrimination claims. In *Pruet Production Co. v. Ayles*, 784 F.2d 1275 (5th Cir. 1986), and *Sherrod v. Sears, Roebuck & Co.*, 785 F.2d 1312 (5th Cir. 1986), the Fifth Circuit rejected the discrimination claims of the plaintiff employees. The *Pruet* court did not address the issue of whether the release had any probative value; the *Sherrod* court expressly noted that no connection whatsoever had been shown between the release and any discriminatory intent of the employer. 785 F.2d at 1315.

though firmly convinced they have done nothing unlawful.[12]

2. It is irrelevant when, or how, settlement negotiations arise.

The Ninth Circuit conditioned the admissibility of settlement agreements on arbitrary distinctions of when and how such negotiations arise. Under its view, settlement agreements tendered to employees at the time of termination are not "settlement offers" within the meaning of Federal Rule of Evidence 408. On the other hand, offers tendered *after* an employee articulates a potential claim, apparently are protected by the Rule.

The EEOC and at least four courts of appeals have concluded that an agreement, such as that offered to Cassino, *when executed* is a valid settlement agreement that will bar an age discrimination claim.[13] Under the Ninth Circuit's view, however, such an offer *if rejected* is not protected by Rule 408. Employers thus face a risky, all-or-nothing proposition. If the employee voluntarily accepts the employer's severance package and signs a release, then the employer will be afforded full protection against the later assertion of employment-related claims. If, however, the

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[12] *See* note 6 and accompanying text *supra*. Indeed, the Rules Advisory Committee specifically noted that an offer to settle is irrelevant for purposes of establishing liability since it "may be motivated by a desire to buy peace rather than any concession of weakness of position." Fed. R. Evid. 408, Notes of Advisory Comm. on Proposed Rules.

[13] *Moore v. McGraw Edison Co.*, 804 F.2d 1026 (8th Cir. 1986); *Runyan v. National Cash Register Corp.*, 787 F.2d 1039 (6th Cir.) (en banc), *cert. denied*, 107 S. Ct. 178 (1986); *EEOC v. Cosmair, Inc.*, 821 F.2d 1085 (5th Cir. 1987); *Sullivan v. Boron Oil Co.*, 831 F.2d 288 (3d Cir. 1987); 29 C.F.R. § 1627.16(c)(1).

employee does not accept, the offer may be admitted against it to prove an intent to discriminate.

This makes no sense. A settlement offer is a settlement offer. The essential nature of the offer is not transmuted simply because the employee chooses not to accept it. It does not follow that an employer's otherwise-enforceable offer loses the protection of Rule 408 simply because the employee turns it down.

The Ninth Circuit attempted to justify its decision by saying that employers' offers gain the protection of Rule 408 only when made in response to an employee's asserted claim.[14] But the timing of the offer is not consequential. When an employee is notified of termination, the facts which potentially could give rise to litigation already exist and generally are known. In addition, an employer, by offering a settlement agreement and release, brings the potential for litigation to the employee's attention. The settlement agreement, in order to be valid, must even identify the rights or claims that the employee is being asked to waive. *E.g.*, 29 C.F.R. § 1627.16(c)(2). And the

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[14] As the Ninth Circuit attempted to explain: "[T]he protections of Rule 408 were designed to encourage the compromise and settlement of *existing disputes*." 817 F.2d at 1343 (emphasis added). But an enforceable settlement agreement *by definition* settles an "existing dispute." Only "existing disputes" lawfully can be settled under the ADEA. *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 860 (5th Cir. 1975) (only bona fide factual disputes can be settled), *cert. denied*, 425 U.S. 944 (1976); *see Runyan v. National Cash Register Corp.*, 787 F.2d 1039, 1044 (6th Cir.) (en banc) (motive behind discharge is a factual dispute that can be settled), *cert. denied*, 107 S. Ct. 178 (1986). *Amicus* demonstrated above that the agreement when signed *is* a valid waiver. *See* note 13 and accompanying text *supra*. If an *executed* settlement agreement is enforceable — and it is — then a *proposed* settlement that is rejected nevertheless covers an "existing dispute" and retains the protection of Rule 408.

employer must specifically "encourag[e] [the employee] to consult with an attorney." *Id.*[15] Thus, the Ninth Circuit's rule — conditioning the admissibility of a settlement offer on *who* first broaches the subject of litigation — is both arbitrary and unrealistic.

This rule also will lead to absurd results. Consider two employees who are laid off in a reduction-in-force. Neither employee was the victim of discrimination. One employee, however, asserts a frivolous legal claim. The employer then can offer extra severance pay to that employee in exchange for a release and, under the court of appeals' decision, evidence of the settlement offer is inadmissible if the employee rejects the deal and sues. The second employee, however, cannot receive any such offer, because he was unwilling to assert a frivolous claim. The Ninth Circuit's rule thus rewards the litigious and penalizes the reasonable.

Finally, the Ninth Circuit's rule offends all notions of judicial economy. By impeding employers and employees from voluntarily and expeditiously settling employment claims (not just age discrimination claims),[16] the court of appeals' decision frustrates the public policy favoring voluntary settlement which underlies our employment discrimination laws, the EEOC regulations, Federal Rule of Evidence 408, and analogous state evidence code provisions.[17]

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[15] The release offered in this case fulfilled each of the EEOC's criteria for assessing the validity of a release. *See* note 8 *supra*.

[16] The Ninth Circuit's ruling regarding the applicability of Rule 408 to settlement agreements apparently is not limited to age discrimination claims.

[17] The overriding purpose of Rule 408 is to promote the "public policy favoring the compromise and settlement of disputes." Fed. R. Evid. 408, Advisory Comm. Notes.

III

IF THE COURT WERE UNSURE ABOUT THE IMPORTANCE OF RESOLVING THE QUESTION PRESENTED, IT SHOULD REQUEST THE VIEWS OF THE EEOC AND THE SOLICITOR GENERAL BEFORE CONSIDERING THE PETITION FOR CERTIORARI

Employers are being pulled in two directions. The Ninth Circuit has held that specifying an ADEA waiver in a proposed release is "probative [evidence] on the issue of discrimination." 817 F.2d at 1342. The EEOC, on the other hand, has made clear that an ADEA waiver will not be enforceable unless the document "clearly waive[s] the employee's rights under the ADEA." 29 C.F.R. § 1627.16(c)(2)(i). Thus, as the law now stands, the EEOC is instructing employers that releases, to be effective, must contain specific waiver language;[18] the Ninth Circuit, however, says that to include such language essentially is to admit guilt.

Guidance from this Court is needed. If the Court has any doubt about the importance of reviewing the Ninth Circuit's decision, it should request the views of the EEOC and the

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[18] The language of a general release is more probative of the thoroughness of an employer's legal counsel than of the employer's discriminatory intent. Even without the EEOC rule, competent attorneys of course make releases as comprehensive as possible in order to foreclose any possibility of litigation. The all-inclusive language resulting from such thoroughness purposely will have been drafted to enumerate any conceivable basis upon which a claim potentially might be brought. *See EEOC v. United States Steel Corp.*, 583 F. Supp. 1357 (W.D. Pa. 1984) (release must identify the specific nature of the claim or claims being waived).

Solicitor General before considering the petition for certiorari.

IV

CONCLUSION

For the foregoing reasons, *amicus* respectfully urges this Court to grant the petition and reverse the judgment below.

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Respectfully submitted.

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